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IN THE

Supreme Court of the United States

METLAKATLA INDIAN COMMUNITY,
Petitioner,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Federal Circuit err when it ruled that the limitations period in Section 605(a) of the Contract Disputes Act (CDA) is not jurisdictional, but then also held that the timely filing of a claim and exhaustion under Section 605(a) is a jurisdictional requirement that has to be met before class action tolling may apply to that very same limitations period?

2. Did the Federal Circuit err in holding that a potential class member must take action to establish class action court jurisdiction over that potential class member's claim in order for that same class member to obtain the benefit of class action limitations tolling?

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Metlakatla Indian Community ("Community") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Federal Circuit opinion (Pet. App. 1a-26a) is reported at 583 F.3d 785. Petitioner's petition for rehearing and rehearing en banc (Pet. App. 27a-28a) was denied on March 10, 2010 and is unreported. The opinion of the Civilian Board of Contract Appeals (Pet. App. 29a-47a) is reported at C.B.C.A. No. 280-ISDA, 2008 WL 3052446 (July 28, 2008).

JURISDICTION

The Court of Appeals judgment was entered on September 29, 2009. Pet. App. 2a. The denial of rehearing was issued on March 10, 2010. Pet. App. 28a. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Indian Self Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 450m-1(d) provides that:

> The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).[1]

The Contract Disputes Act (CDA), 41 U.S.C. § 605(a) (Pet. App. 48a) provides:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. * * * Each claim by a contractor against the government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim. * * *.

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[1] The administrative appeal authority has been transferred to the Civilian Board of Contract Appeals (CBCA herein). *See* 41 U.S.C. § 438.

STATEMENT OF THE CASE

The CDA, 41 U.S.C. § 605(a), provides that contract claims be submitted to a contracting officer within six years of accrual of the claim.

In *American Pipe & Constr. Co. v. Utah*, the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. 538, 554 (1974).

This case turns on the relationship between this class action tolling rule and the limitations and claim submission requirement of Section 605(a). The Federal Circuit held that the limitations period in Section 605(a) is not jurisdictional and could be tolled. It then did an about face and held that the timely claim filing requirement was a prerequisite to court jurisdiction, and without the filing of a claim by a putative class member, the class action tolling rule could not be invoked. This created a circular analysis which results in a complete nullification of the class action tolling rule in an administrative claim setting. The Court did so by failing to properly interpret the nature of the claims processing rules of the CDA.[2]

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[2] The Community agrees with and also adopts as a basis for review the reasons set forth in the related petition for certiorari *Arctic Slope Native Association v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2010), *petition for cert. filed*, 78 U.S.L.W. 3581 (U.S. Apr. 6, 2010) (No. 09-1172). Petitioner ASNA argues that the Federal Circuit issued a ruling in conflict with the controlling rule that "all" members of an asserted class benefit from tolling, not just a select few. *See also* argument below at III.

This Court has repeatedly stated that all courts must act with clarity in designating a statutory filing requirement as jurisdictional, confirming the view that "not all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional." *Union Pacific Railroad Co., v. Brotherhood of Locomotive Engineers*, ___U.S.___, 130 S.Ct. 584, 596 (2009) quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006). This Court distinguishes between rules that define subject matter jurisdiction, which refer to "a tribunal's power to hear a case," *id.*, and claims processing rules, which do not "reduce the adjudicatory domain of a tribunal. . . ." *Id. See also Reed Elsevier, Inc. v. Muchnick*, ___U.S.___, 130 S.Ct. 1237, 1244 (2010) (citations omitted) ("In light of the important distinctions between jurisdictional prescriptions and claims processing rules, we have encouraged federal courts and litigants to 'facilitat[e]' clarity by using the term 'jurisdictional' only when it is apposite . . ."). The Federal Circuit's ruling did not facilitate clarity; instead it establishes a confusing and circular rule. The Court correctly concluded the limitations period for filing a claim is not jurisdictional generally, but then found that timely filing of an administrative claim with a contracting officer is a jurisdictional prerequisite and without it, class action tolling could not apply. This conclusion results in the designation of the Section 605(a) claim submission requirement as both jurisdictional and not jurisdictional in a single holding.

Referencing language from *American Pipe* which finds tolling applicable to "all asserted members of the class who would have been parties had the suit been permitted to continue as a class action," Pet. App. 18a-19a, (citing to 414 U.S. at 554), the Court focused not on whether the Community was within

the asserted class as defined in the complaint, but rather on whether the Community would otherwise have been within the class court's jurisdiction if the class had been certified. The Court of Appeals concluded that the Community would not have been a party to the class action because it had not met the CDA timely claim filing requirements. Therefore, the Community could not take advantage of class action tolling. This reasoning is contrary to many precedents of this Court and other Circuits. *See* below at III. A putative class member need not take any action or even know about the proposed class action to be a member of the class. *American Pipe*, 414 U.S. at 551. The Federal Circuit's ruling requires a putative class member not only to know about the case, but to take affirmative action by filing a claim.

Review is warranted by the Court of Appeals' failure to adhere to this Court's instructions for treating claims processing rules with clarity and consistency, and by the Court's imposition of claim filing requirements contrary to the tolling rule resulting in an incomprehensible and circular holding.

STATEMENT OF FACTS

1. The Metlakatla Indian Community is a federally recognized Indian Tribe located in Alaska. The Community operates health care facilities and provides health care services to its members and other beneficiaries pursuant to contracts with the IHS under the ISDEAA. For FY 1997 and FY 1998, the Community was a Co-Signer of the Alaska Tribal Health Compact, pursuant to which the Community entered annual funding agreements with the IHS under Title III of the ISDEAA.

2. The ISDEAA authorizes tribes to enter into agreements with the Secretary to assume responsibility to provide programs, functions, services and activities (PFSAs) that the Secretary would otherwise be obligated to provide to beneficiaries of various federal programs. As part of the agreement, the Secretary must provide two types of funding under the ISDEAA: (1) "program" funds, in the amount the Secretary would have provided for the PFSAs had the IHS retained responsibility for them, *see* 25 U.S.C. § 450j-1(a)(1); and (2) contract supports costs (CSC), which cover reasonable administrative and overhead costs associated with carrying out the PFSAs, *see* 25 U.S.C. §§ 450j-1(a)(2), (3), and (5). The latter category is the subject of the underlying dispute.

Under its ISDEAA agreement with the Community, the IHS agreed to provide CSC according to the requirements of the statute. The agency failed to fulfill that statutory and contractual obligation and the Community sought relief, first through participation in a putative class action and then, when class certification was denied, by making individual claims.

3. There has been a continuing controversy over the Secretary's duty to fully fund the ISDEAA CSC requirements. On March 5, 1999, the Cherokee Nation of Oklahoma filed a complaint for breach of contract for failure to fully fund CSC and a request for the certification of a class action in the federal District Court for the Eastern District of Oklahoma. The proposed class included "[a]ll Indian tribes and tribal organizations operating Indian Health Service programs under contracts, compacts, or annual funding agreements authorized by the [ISDEAA] that were not fully paid their contract support cost needs, as determined by IHS, at any time between 1988 and

the present." *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001). The Community fit within this definition and had the class been certified, the Community would have been bound by any judgment unless it opted out.

4. Almost two years later, on February 9, 2001, the district court denied class certification. *Id.* at 366. The district court and the Tenth Circuit then went on to rule on the merits. The Tenth Circuit held that the IHS's duty to pay CSC was limited to amounts identified in the committee reports accompanying the appropriations acts and the IHS had no duty to reprogram funds to meet its statutory or contractual obligations. *Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054, 1063 (10th Cir. 2002).

At the same time, another case concerning CSC was being prosecuted. In *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003), the Federal Circuit affirmed a ruling by the former Interior Board of Contract Appeals (IBCA) upholding the right of tribal contractors to full CSC funding. The Federal Circuit stated its disagreement with the Tenth Circuit, holding that the Secretary had no valid excuse for failing to meet his contractual obligations "to pay full contract support." 334 F.3d at 1088.

In 2005 a unanimous Supreme Court affirmed the Federal Circuit's ruling and overturned the Tenth Circuit in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (the "*Cherokee* case"), holding that the IHS was obligated to reprogram funds from its unrestricted lump-sum appropriation to pay tribal contractors their full CSC.

5. Since the class certification had been denied, in *Cherokee Nation v. U.S.*, it was now up to the individual claimants to file claims for unpaid CSC and to enforce the duty this Court defined in the *Cherokee* case.

Under the ISDEAA, a dispute between a tribal contractor and the agency concerning its contract is governed by the CDA. 25 U.S.C. § 450m-1(d); *see also* 25 C.F.R. Part 900, Subpart N. On June 30, 2005, the Community filed requests for a contracting officer's decision on its claims for unpaid CSC in FYs 1995-1999. The Community's requests for contracting officer's decisions for fiscal years 1995 through 1997 stated claims identical to those presented in the class action and the *Cherokee* case—the failure of the Secretary to fully fund CSC. The Community's claim for FY 1998 was for full funding of CSC but based on a different legal theory. It is undisputed that if legal or equitable tolling were applied, the Community's claims were timely filed with the contracting officer. The contracting officer never ruled on any of the Community's requests for decisions. The decisions were deemed denied by operation of law, 41 U.S.C. § 605 (c)(5) (Pet. App. 49a) and on May 5, 2006, the Community filed its administrative appeal.

6. In the administrative proceeding, the Government argued that the CDA is a waiver of sovereign immunity and as such, the limitations period is a jurisdictional statute to be strictly construed. Because the Community's claims were not filed with the contracting officer within the six-year time limit of 41 U.S.C. § 605(a) (Pet. App. 48a) they were barred.

The Community argued that under this Court's precedents, Section 605(a) was more like a traditional

statute of limitations, not a jurisdictional prerequisite. As such, it was subject to tolling, both class action and equitable. The Community qualified for class action tolling under *American Pipe* and other Supreme Court precedents because it had been part of the putative class action asserted in the *Cherokee* case, which sought full payment of CSC for all similarly situated contractors and the limitations period was tolled under the class action tolling rule until certification was decided. The Community also established that the presumption of equitable tolling applied under *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) because Congress showed no intention by statutory language or legislative history that Section 605(a) should not be subject to tolling.

The CBCA disagreed. While it recognized that tolling applies to statutes of limitations generally, the Board concluded that, "Section 605(a) does not contain a statute of limitations that imposes a time limit for filing suit. Rather, it imposes a time limit which this Board's precedent established is a prerequisite to our jurisdiction." Pet. App. 43a. As such the time limit could not be tolled. Pet. App. 45a.

7. On appeal to the Federal Circuit, the Community argued that Section 605(a) was not a jurisdictional limitations period. In *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), this Court defined the distinction between a jurisdictional limitations period and a claims processing rule. A traditional statute of limitations protects a defendant against stale claims and is treated as an affirmative defense. A limitations period for filing an appeal or which delineates the subject matter jurisdiction of a court is jurisdictional. *Compare*, *John R. Sand &*

Gravel, 552 U.S. at 134 (2008) and *Bowles v. Russell*, 551 U.S. 205 (2007).

The language of Section 605(a) and its legislative history support a conclusion that the limitations period and the exhaustion requirement are not jurisdictional prerequisites that would preclude tolling. Most statutes of limitations are intended to protect defendants against stale claims. The law typically treats a limitations defense as an affirmative defense. *John R Sand*, 552 U.S. at 134. Section 605(a) presents just such a traditional claims processing statute with a limitations period that may be subject to tolling. *Id.*; *See also Day v. McDonough*, 547 U.S. 198, 205 (2006); *Diaz v. Kelly*, 515 F.3d 149, 153-54 (2d Cir. 2008) (most statutes of limitations are affirmative defenses subject to equitable tolling, as confirmed by Supreme Court in *John R. Sand*).

8. In addition, courts agree that *American Pipe* Rule 23 tolling applies in the administrative claim context until the court resolves class certification. *Sharpe v. American Express Co.*, 689 F. Supp. 294, 300-01 (S.D.N.Y. 1988) ("This Court concludes that the *American Pipe-Parker* analysis applies equally well to putative class members who have yet to file an administrative claim.") *cited with approval in Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994); *see also McDonald v. Sec'y of Health & Human Servs.*, 834 F.2d 1085, 1092 (1st Cir. 1987); *Barrett v. United States Civil Service Comm'n*, 439 F. Supp. 216, 217 (D.D.C. 1977); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1392-1393 (11th Cir. 1998) (after class certification denied, court then resolved whether an excluded class member can proceed to exhaustion).

9. The Court of Appeals correctly concluded that the limitations period in Section 605(a) does not deprive a court of jurisdiction and that tolling, both equitable and class action tolling, may apply. As to class action tolling generally, the court stated: "We therefore reject the government's sweeping contention that any time limitation, such as the limitation in section 605(a), which defines the matters that a *board or court* may adjudicate, is not subject to class action tolling because it is "jurisdictional" in nature." Pet. App. 12a.

The Court of Appeals also found that Section 605 was subject to equitable tolling. In its analysis, it listed significant characteristics of the statute. "The statutory time limitation of section 605(a) is a simple provision and does not contain technical language. It provides in the simplest terms that each claim by a contractor 'shall be submitted within 6 years of the accrual of the claim.' . . . The language of the time limitation in section 605(a) is anything but emphatic; it simply states that the claim 'shall be submitted' within six years." Pet. App. 25a. The Court noted that "there is no long history of case law holding that the time limitation of section 605(a) is absolute." *Id.* at 24a. In distinguishing the limitations from other types of jurisdictional statutes, the Court concluded it was not a limitations period in the nature described by this Court in *Bowles*: "Section 605(a) is in the nature of a statute of limitations, not a statute that governs the timing of review." Pet. App. 26a, n.6.

Even so, these same factors did not rise to a level sufficient to allow class action tolling to apply to the Community's claims. The Federal Circuit's circular reasoning goes as follows: even though the Section 605(a) limitations period is not jurisdictional as

defined by this Court in *Bowles*, submitting a timely claim to the contracting officer is a jurisdictional prerequisite for the district court to exercise jurisdiction over a CDA claim. Pet. App. 43a. The Court then found that the class action tolling rule only applies to class members who *would have* been parties to the class action *if* it had been approved. Pet. App. 18a. Applying this hypothetical, retrospective, fact-based analysis, the Court found that the Community would not have been within the class court's jurisdiction and therefore it would not have been a member of the class because its claims had not been previously filed with the contracting officer. As such, the Community was not entitled to the benefit of class action tolling of the limitations period for its CDA claims. "[A] party's failure to exhaust mandatory administrative remedies bars the court from treating that party as a class member. In that setting, class action tolling does not apply because the party that failed to comply with the statutory requirement to present its claims to a contracting officer would not have satisfied the requirement, set forth in *American Pipe*, making class action tolling available 'to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.' 414 U.S. at 554, 94 S.Ct. 756." Pet. App. 18a-19a.

So, while the Federal Circuit ruled broadly that the limitations period was not jurisdictional, it ruled more narrowly that the limitations period was, in fact, jurisdictional by linking timeliness with the claims submission requirement. "Subject to any applicable tolling of the statutory time period, the *timely* submission of a claim to a contracting officer *is a necessary predicate to the exercise of jurisdiction by a court* or board of contract appeals over a contract

dispute governed by the CDA." Pet. App. 13a. (emphasis added). Importantly, it was the limitations period for that very same claim submission requirement that the Community sought to have tolled and which the court had already ruled was not jurisdictional. In this way, the Section 605(a) limitations period went from being a non-jurisdictional limitations period to a jurisdictional one. The Court found the Community could not benefit from class action tolling "*in these cases*" because they had not first submitted timely claims as required by Section 605(a). Pet. App. 22a.

The Court of Appeals ruling essentially renders class action tolling unavailable for the limitations applicable to the submission of administrative claims on the erroneous ground that a putative class member may only have access to tolling by first establishing the class court's jurisdiction, which can only be done by filing a timely claim.

The Community filed a motion for rehearing and rehearing en banc for the Court's ruling as to class action tolling, pointing out to the Court that its conclusion that timely presentment was a jurisdictional prerequisite was contrary not only to the class action tolling rules, but also to the language and legislative history of the CDA and the ISDEAA.[3] The request for rehearing was denied. Pet. App. 28a.

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[3] The Community filed a joint petition for rehearing and rehearing en banc with the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians.

REASONS FOR GRANTING THE WRIT

I. THE RULING BELOW TREATS THE CDA CLAIM PROCESSING RULE AS BOTH NON-JURISDICTIONAL AND JURISDICTIONAL, IN VIOLATION OF THIS COURT'S RECENT HOLDINGS THAT THE TEXT, CONTEXT, AND HISTORY OF A STATUTORY PROVISION MUST CLEARLY STATE THE JURISDICTIONAL NATURE OF THE STATUTE.

In holding that Section 605(a) of the CDA is not a sweeping jurisdictional limitations period, the Federal Circuit correctly adhered to this Court's clear guidance on distinguishing between jurisdictional and non-jurisdictional limitations periods. It rightly rejected the Government's contention that any statute waiving immunity was necessarily jurisdictional. But in an inexplicable twist, the Court then declined to allow class action tolling of that same limitations period because it found the timely submission of a claim is jurisdictional.

The reasoning of the Court of Appeals goes to the very heart of this court's repeated admonitions that all courts must be clear about what is and is not identified as jurisdictional. In *Arbaugh,* 546 U.S. at 510, this court stated that "in recent decisions, we have clarified that time prescriptions, however emphatic, 'are not properly typed 'jurisdictional,'" *citing to Scarborough,* 541 U.S. at 414. This Court has instructed that a statute's "text, context, and relevant

historical treatment" must be taken into account when deciding the nature of the statutory prerequisite. *Reed Elsevier*, 130 S.Ct. at 1246. The Court below failed not only to take into account the text and history of the CDA, it did not even reference its own examination of the CDA in which it found Section 605 was a simple statute containing no language suggesting it was jurisdictional. Pet. App. 25a. *See also* discussion above at 10.

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), this Court recognized that a statutory requirement to take an action before filing a lawsuit is not automatically "a jurisdictional prerequisite to suit." More recently in both *Union Pacific Railroad*, 130 S.Ct. 584 and *Reed Elsevier*, 130 S.Ct. 1237, this Court reaffirmed the dichotomy between claims processing rules and jurisdictional prerequisites. In both cases, this Court cited to *Zipes*, *Arbaugh*, and *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004) as examples where this Court clearly identified claims processing rules that, while seemingly jurisdictional, did not, in fact, deprive a court of jurisdiction to hear a claim. In *Reed Elsevier*, this court expressly cited to "threshold requirements that claimants must complete or exhaust before filing suit," as "nonjurisdictional." 130 S.Ct. at 1246-47.

In *Reed Elsevier*, the district court had approved a class action whose members were copyright holders that had failed to register their claims as required by statute. The statute at issue, 17 U.S.C. § 411, provided that "no civil action for infringement of the copyright . . . shall be instituted until . . . registration of the copyright claim has been made. . . ." 130 S.Ct. at 1241. Following several other Circuits, on appeal the appeals court had held that the registration

requirement was jurisdictional and found the lower court lacking jurisdiction to certify the class and the proposed settlement, *i.e.*, the class members could not be within the court's jurisdiction because they had not met the statutory precondition by registering their claims. *Id.* at 1243.

This Court looked to the following factors in establishing the text, context, and historical treatment of the statute: (1) the precondition was not clearly labeled jurisdictional, *id.* at 1247, (2) the precondition was located in a section separate from the section on the court's jurisdiction, *id.* at 1245-46, and (3) similar exhaustion requirements, like those found in Title VII, had been consistently found to be non-jurisdictional, *id.* at 1246-47. On this basis, this Court held that the statute did not "clearly state" that the registration requirement was a precondition that would impact a Court's subject matter jurisdiction.

These same factors apply equally to the CDA. The condition to file a timely claim with the contracting officer is not labeled jurisdictional in Section 605(a). The administrative board's jurisdiction is outlined in a separate provision of the CDA. Section 605(b) defines finality: "The contracting officer's decision on the claim shall be final and conclusive *and not subject to review in any forum . . . unless an appeal or suit is timely commenced. . . .*" (emphasis added) Pet. App. 49a. Section 606 specifies the timing of review: "Within ninety days from the date of receipt of a contracting officer's decision under Section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals. . . ." Neither the finality nor the timing of review provision requires, as a clearly stated jurisdictional prerequisite, the

timely filing of a claim for contracting officer's decision. In addition, the statute permits claims to be deemed denied, 41 U.S.C. § 605(c)(5), suggesting that a contracting officer's decision is not a jurisdictional key to board or court review of a contractor's claim.

The legislative history of the CDA is devoid of any statement of Congressional intention to impose an absolute jurisdictional requirement that would preclude tolling. As enacted in 1978, the CDA had no statute of limitations period for presenting claims to the contracting officer (CO).[4] The failure to place this limitations period in the original version of the law is significant.

In 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which amended the CDA, 41 U.S.C. § 605(a), to include the six-year limitation. Pub. L. No. 103-355 § 2351, 108 Stat. 3243, 3322 (Oct. 13, 1994). Neither the FASA itself nor its legislative history discusses the reason for adding the six-year limitation to Section 605(a). That Congress added this time limitation without comment is significant. Since Congress did not impose any time limitation at all on the waiver of sovereign immunity for 16 years, it is very unlikely that it suddenly intended to impose a categorical "jurisdictional" six-year deadline for filing claims with no explanation.

Direct reference to the text and context of the statute has long been the foundation of this Court's jurisdictional analysis as applied to administrative statutory schemes. For example, in *Weinberger v. Salfi*, 422 U.S. 749 (1975), this Court considered whether the Social Security Act (SSA) mandated

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[4] Contract Disputes Act of 1978, Pub. L. No. 95-563 § 6, 92 Stat. 2384 (Nov. 1, 1978).

jurisdictional exhaustion and whether it was subject to any exceptions. The Court noted that the doctrine of administrative exhaustion "should be applied with a regard for the particular administrative scheme." 422 U.S. at 765. The *Salfi* court found that the "sweeping and direct" nature of the statute's administrative review system mandated exhaustion. *Id.* at 757.

In *Avocado Plus Inc. v. Veneman*, 370 F.3d 1243 (D.C. Cir. 2004), the D.C. Circuit adopted this test to determine whether exhaustion is "jurisdictional" or whether it is "non-jurisdictional" and subject to waiver. Citing to *Salfi*, the court stated, "In order to mandate exhaustion, a statute must contain "'[s]weeping and direct' statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim." 370 F.3d at 1248. Both *Salfi* and *Avocado* make clear that the terms of the statute control a finding of whether exhaustion is jurisdictional and not subject to exception.

Rather than analyzing the CDA, the Court of Appeals concluded by analogy that the CDA was more like the SSA, mandating timely exhaustion. Pet. App. 15a.[5] This analogy is clearly incorrect. In *Salfi*, the statute absolutely precluded court jurisdiction absent a final decision. 422 U.S. at 757 ("no action shall be brought"). The *Avocado* court cited to language in the Federal Power Act that was equally sweeping and preclusive. 370 F.3d at 1248 ("No

[5] The Federal Circuit cited to *Salfi* as support for its conclusion that exhaustion is required but only by analogy. The Court should have instead applied the *Salfi* standards to the CDA.

proceeding . . . shall be brought. . . . No objection . . . shall be considered. . . .").

The CDA has no such sweeping language. In its equitable tolling analysis, the Federal Circuit found that the limitations language is neither technical nor emphatic. Pet. App. 25a. So, too, the timely claim submission requirement simply says that a claim "shall be submitted," Section 605(a).

The application of the CDA to the ISDEAA is also relevant. The CDA has applied to ISDEAA disputes since 1988, long before this statute of limitations was added. *See* Pub. L. No. 100-472 § 206(a) (Oct. 5, 1988) (adding the current Section 110(d) of the ISDEAA, which incorporates by reference the CDA). When it extended the CDA remedy to ISDEAA contracting, Congress provided broad remedial assistance to tribal contractors. In 1988 Congress was addressing an issue identical to that being litigated here: the failure of agencies to fully fund CSC requirements under the statute. At the time, the BIA argued the tribal contractor had no remedy for this breach. Congress provided a remedy by expressly applying the CDA.

> Section 110(d) subjects self-determination contracts to the Contract Disputes Act, thereby affording self-determination contractors the procedural protections now given other federal contractors by that Act.
>
> * * * Not only does existing law make it virtually impossible for self-determination contractors to enforce their rights under the Act, but the Bureau of Indian Affairs has also taken to arguing that such contractors have no legal remedies at all by which to redress the Bureau's

> failure to fund their contracts with indirect costs at the level mandated by law and by their contract terms."
>
> * * * The strong remedies provided in these amendments are required because of [IHS's and BIA's] consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs.

S. Rep. No. 100-274 at 36-38 (Dec. 21, 1987). The ISDEAA does not suggest any intention to restrict access to CDA remedies. Rather it supports a flexible, broad reading of the statute.[6]

Had the Circuit examined the "text, context, and relevant historical treatment" of the statute, *Reed Elvesier*, 130 S.Ct. at 1246, *citing Zipes*, 455 U.S. at 393-395, and applied the "sweeping and direct" test of *Salfi* to determine if the Section 605(a) claim submission and exhaustion requirement is "jurisdictional," it could only have concluded that timely presentment and exhaustion are not jurisdictional. Instead, the Court issued a two-headed ruling, finding that the limitations period in Section 605(a) was not absolutely jurisdictional but also finding that the submission of a claim had to be filed timely before a court could exercise jurisdiction over it. This inconsistency

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[6] Consistent with its remedial nature and the federal trust responsibility to tribes, the ISDEAA requires liberal interpretation in favor of tribes. 25 U.S.C. § 450*l*(c) (setting forth liberal construction rule in section 1(a)(2) of mandatory model contract); *id.* § 450n(2) (affirming "trust responsibility of the United States with respect to the Indian people").

is not only confusing, it is self-negating and renders class action tolling meaningless.

II. THE COURT OF APPEALS ERRED WHEN IT ANALOGIZED THE CDA TO OTHER STATUTES WITHOUT EXAMINING THE PRECISE TERMS OF THE CDA.

The Federal Circuit failed to follow the clear jurisdictional/non-jurisdictional dichotomy, rejecting cases likes *Zipes* and others which found class action tolling for administrative claims, on the ground that those cases were peculiar to the "specific language and legislative history of Title VII." Pet. App. 15a.

The Federal Circuit also equated the CDA to the Federal Torts Claims Act (FTCA) on the ground that like the FTCA, contract disputes are not "inherently class actions." Pet. App. 16a.[7]

The Court got these distinctions backwards and wrong. This Court has repeatedly cited to Title VII cases as appropriate examples of the non-jurisdictional nature of administrative claim processing rules. *See e.g., Union Pacific Railroad,*

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[7] The Federal Circuit also cites cases that have ruled on this CDA/ISDEAA question. Pet. App. 18a, citing to *Menominee Indian Tribe of Wis. v. United States*, 539 F.Supp.2d 152 (D.D.C. 2008)(*reconsideration denied* April 30, 2008); *Pueblo of Zuni v. United States*, 467 F.Supp.2d 1099 (D.N.M. 2006); *Ramah Navajo School Bd., Inc., v. United States*, 83 Fed. Cl. 786 (2008). However, all of those cases are contrary to the Federal Circuit's own ruling since these courts all found that the CDA is a waiver of immunity, and as such, Section 605(a) is absolutely jurisdictional and cannot be tolled. *See e.g., Menominee*, 539 F.Supp.2d at 154 ("Statutory time limits are jurisdictional in nature, and courts do not have the power to create equitable exceptions to them [citing to *Bowles v. Russell*, 551 U.S. 205 (2007]").

130 S.Ct. at 596-597 (citing approvingly *Zipes* and *Arbaugh*, both Title VII cases that correctly applied the analysis). *See also Reed Elsevier* (same). This Court has not treated these cases as unique to the terms of Title VII, but the Federal Circuit considered them of limited precedential value. For example, the Federal Circuit, specifically distinguished *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), Pet. App. 14a, where this Court found that damages could be awarded to unnamed class members who had not filed administrative claims under Title VII of the Civil Rights Act. 422 U.S. at 414, n.8. *Albemarle Paper* has been cited as a general example of the rule that "to promote judicial economy, the Supreme Court has held that class members need not exhaust administrative remedies individually in order to participate as a member of the class." Newberg on Class Actions, § 1:3 (4th ed.).

Of the several cases that the Federal Circuit distinguished, Pet. App. 19a-20a, all agreed that *American Pipe* Rule 23 tolling applies in the administrative claim context until the court resolves class certification. The reasoning is compelling. "Applying the tolling rule to the filing of administrative claims will have the same salutary effect as exists for the filing of lawsuits. In both cases, tolling the statute of limitations during the pendency of a class action will avoid encouraging all putative class members to file separate claims with the EEOC and the respective state agencies in deferral states. . . . This Court concludes that the *American Pipe-Parker* analysis applies equally well to putative class members who have yet to file an administrative claim." *Sharpe v. American Express Co.*, 689 F. Supp. 294, 300-01 (S.D.N.Y. 1988); *cited with approval in Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994); *see also*

McDonald v. Sec'y of Health & Human Servs., 834 F.2d 1085, 1092 (1st Cir. 1987).

If a court declines to certify, or modifies the class to exclude certain members, then the excluded claimant has the right to proceed to pursue an individual claim, and at that time must meet the restarted applicable statute of limitations. *See* Wright, Miller & Kane, 7B Fed. Prac. & Proc., § 1795. For example, in *Armstrong*, 138 F.3d 1374 (11th Cir. 1998), the Court of Appeals held that the pendency of a class action tolled both the initial administrative charge period under the Age Discrimination in Employment Act (ADEA), which governs the initial presentment of a claim, and the 90-day period for filing suit in federal court after notice of dismissal of the charge. *Id.* at 1392-93. In fashioning the definition of the class members the court had to consider what to do about those excluded from the class. The court set forth specific orders as to who qualified to proceed to exhaust administrative remedies and who would be barred.

In *Barrett,* 439 F. Supp. at 217, the court considered "the effect of the decertification of the class on the running of the statute of limitations," in the context of an administrative class action. The Government argued that since the class was only conditionally certified, the statute was not tolled for those who were later declared to be excluded from the class. The court disagreed: "[T]he tolling rule protects all persons who were asserted to be members of the class, even if they later were removed." *Id.* at 218. The court allowed those excluded from the class to proceed administratively with individual claims and fashioned an order defining who could and could

not proceed individually based on the application of tolling. *Id.*

Distinguishing these numerous precedents, the Federal Circuit analogized the CDA to the FTCA to support its conclusion that timely claim submission and exhaustion are jurisdictional. Pet. App. 16a. But these cases are based on unique statutory requirements. As explained in Newberg:

> It is now settled that proceedings for judicial review of a governmental agency decision may be maintained as a class action. Some courts have held that certain statutes require each individual class member to exhaust administrative remedies, thus precluding a representative class suit. Because virtually all statutes that provide an administrative remedy that must be exhausted before judicial relief is available require individual exhaustion, *those decisions holding that administrative exhaustion precludes class actions either do not survive the ruling or are based on genuinely unique statutory requirements.*

Newberg on Class Actions, § 5:15 (emphasis added).

The FTCA cases that found exhaustion precludes tolling were all based on a specific regulation that required the claim be presented "by the injured person" or his authorized representative, 28 C.F.R § 14.3, thus precluding a class representative from fulfilling the administrative exhaustion requirement. *See e.g., Caidin v. United States*, 564 F.2d 284, 286 (9th Cir. 1977); *In Re Agent Orange Prod. Liab. Litig.*, 818 F.2d 194 (2d Cir. 1987). No such unique statutory or regulatory structure exists under the ISDEAA or the CDA that would justify an exception to the general rule.

Even under the ISDEAA, a court found that a class representative who had exhausted administrative remedies was sufficient to meet the exhaustion requirement for all class members in an ISDEA CSC class action. *Ramah Navajo Chapter v. Lujan*, No. CIV 90-0957 LH/RWM, Order, (D.N.M. 1993) (holding exhaustion by the class representative sufficient because the class action challenged the legality of uniform agency policy)[8]; *see also Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) (holding for tribal class on merits). *But see Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007) (stating disagreement).

The Court of Appeals significantly erred by failing to interpret the CDA using its own language and history. Reference to other administrative claims processing rules, such as those that have been established in the Title VII and other statutory cases, provide valid points of reference and cohesive standards for assessing a statute's jurisdictional nature. The Circuit's failure to apply these standards to the CDA merits review.

III. TOLLING APPLIES TO ALL PUTATIVE CLASS MEMBERS, WHETHER OR NOT THEY ARE LATER FOUND TO BE ACTUAL MEMBERS OF THE CLASS.

This Court stated in *American Pipe* that all members of the putative class, that is, those members of the class *as defined in the complaint*, are to be given the benefit of tolling until the class certification and

[8] This unpublished decision is included in the record below at Metlakatla Indian Community Rebuttal Brief, Exhibit A, *Metlakatla Indian Cmty. v. Dep't of Health & Human Servs.*, CBCA Dkt. No. 4767-71 2006, *filed* Dec. 29, 2006.

the definition of the class is resolved, which is to say, until the court addresses whatever grounds for class opposition are raised. 414 U.S. at 552.

But the Federal Circuit citing to *American Pipe*, emphasized not the definition of the class, but the possibility of court jurisdiction finding that class action tolling applies to "all asserted members of the class *who would have been parties had the suit been permitted to continue* [as a class action." Pet. App. 18a-19a. (emphasis added). Thus the Court of Appeals severely narrowed *American Pipe* to impose a requirement that a court must have personal and subject matter jurisdiction over a class member before class tolling may apply to a limitations period.[9]

This ruling is in direct conflict not only with *American Pipe* but also with this Court's decisions in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974) and *Crown, Cork & Seal Co., Inc.*, 462 U.S. at 351. Both held that the *American Pipe* tolling extends to putative class members who could not be members of a certified class because they have opted out of the class. This rule springs from the principle that a putative class member is bound by what happens in the class, even if that putative member is later

[9] In the factual context of *American Pipe*, the phrase is descriptive, not qualifying. *American Pipe* dealt with former class members who intervened in the same action after the denial of class certification, and who no doubt would have remained in the class if certified. The case did not involve two groups, only one of which "would have been parties had the suit been permitted to continue." There is no indication in *American Pipe* (or later decisions applying it) that the Court meant this phrase, by negative implication, to mean that tolling does not apply to asserted members who would not have been part of the class if certified – for example, if they opted out.

excluded. "[A]n issue litigated and resolved on a class-wide basis is conclusive as to all putative class members if the absent members were adequately represented by the named litigants and class counsel, *whether or not the court otherwise would have had personal or subject matter jurisdiction over them individually.*" *Puffer v. Allstate Ins. Co.*, 614 F. Supp. 2d 905, 915-16 (N.D. Ill. 2009) (emphasis added) (*citing In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 768 (7th Cir. 2003); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814 (1985) (unnamed class members have status of parties and are bound by decision whether or not court otherwise would have had personal jurisdiction over them).

By looking to whether the Community would have been a member of a certified class rather than whether it fit within the asserted class definition, the Federal Circuit's decision produces a result that nullifies class-action tolling. Rule 23 is simple: the statute is tolled for all *asserted* members of the class, even those unaware of the class action. *American Pipe*, 414 U.S. at 551. A class member has no duty to determine if a class will be certified or even if they might be part of the class. 414 U.S. at 552. A member of the class need not undertake a jurisdictional analysis of the action and the administrative scheme in order to get the benefit of tolling. In fact, putative class members don't have to do anything or even know about the class action. *Id.*; *Phillips*, 472 U.S. at 810. ("[A]n absent class-action plaintiff is not required to do anything."). The Circuit's ruling fatally undermines these fundamental class action tolling rules by requiring a class member not only to know about the class action but also to take action.

Once a class action is commenced the tolling period begins and applies until the class status is worked out. *See* Wright, Miller & Kane, 7B Fed. Prac. & Proc., § 1795; Newberg on Class Actions, § 7:28 ("[A] class complaint is presumed to state a class action for purposes of tolling the statute of limitations for absent class members, before a formal class ruling, even if the class is ultimately denied."). The tolling rule is based in the prior version of Rule 23 in which classes were spurious, essentially joinder actions. Courts were split on whether those joining could meet timeliness requirements based on the filing of the initial complaint or whether each individual claimant had to meet timeliness requirements as they filed to join the action. *American Pipe*, 414 U.S. at 550-51. This in turn raised the problem of what to do about the limitations period if the class certification was denied or if some class members did not qualify to be part of the class. Wright, Miller & Kane, § 1795. The Supreme Court answered, "the commencement of the action satisfied the purpose of the limitation provision as to all those who *might* subsequently participate in the suit as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit. . . ." 414 U.S. at 551 (emphasis added).

But the Federal Circuit ignored these many precedents. Instead the court created false distinctions in to the concept of a party being a potential class member by reasoning that class action tolling protects "parties who could potentially be included as class members but who are ultimately left outside the class, by a court's decision not to certify the class or to certify a narrow class that does not include them." Pet. App. 21a. But tolling does not protect parties,

the court concluded, "over whom the court may not exercise jurisdiction." *Id.*

In so ruling the Federal Circuit doomed not only class action tolling for administrative claims, but its reasoning could also preclude tolling in any instance where a class court narrows a class to exclude certain members on jurisdictional grounds. This is an entirely new perspective in class action tolling and it conflicts with a majority of circuits, which have held that proposed class members who opt out and file separate actions before the class certification decision, and who thus could not be parties to the class action even if certified, also benefit from class-action tolling. *See In re WorldCom Sec. Litig.*, 496 F.3d 245 (2d Cir. 2007); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986 (9th Cir. 2008); *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223 (10th Cir. 2008). *But see Glater v. Eli Lilly & Co.*, 712 F.2d 735 (1st Cir. 1983); *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005).

The Federal Circuit also created a vague rule, that is difficult to apply. The court's reasoning could require a court to enter a fictional alternative world ("would have . . . had the") in which, contrary to actual history, the class was certified. It then requires courts to speculate whether the class court would have permitted a particular class member to participate.[10] Such a hypothetical, retrospective rule

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[10] In the only real-world precedent involving a CSC class action, the Community *was* permitted to continue as a party. In *Ramah Navajo Chapter v. Lujan*, discussed above at 25, the federal district court held that since the class representative had exhausted its remedies, the other class members would not be required to exhaust. Exhaustion by the class representative

is illogical, unworkable, and unfair. The need for a clear and straightforward class action tolling rule in itself warrants review by this Court.

Because the Federal Circuit's ruling has the potential to significantly narrow the scope of class action tolling by redefining what is required of a potential class member in order to ensure the class court can exercise jurisdiction over that party's claim, this Court must grant review.

IV. CLASS TOLLING WORKED AS EXPECTED IN THIS CASE AND THE FEDERAL CIRCUIT RULING WOULD CREATE HAVOC IN PROCESSING ADMINISTRATIVE CLAIMS.

The purpose of tolling is to promote administrative and judicial economy and such was the case here. At the time the *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001) class action was filed, many, if not most, tribes probably never intended to litigate their CSC claims on their own, due to their relatively small amounts compared to the expense and risk of litigation but they had no problem with participating in a class. Had they not relied on the tolling rule, these tribes would have flooded the IHS with claims they may never have intended to litigate, but filed merely to preserve their rights to participate in the proposed class. As a result, the IHS, the board, and the courts would have been inundated with thousands of claims, appeals and actions.

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was held to be sufficient because the class action challenged the legality of uniform agency policy.

Reliance on tolling avoided this result, precisely as contemplated by Rule 23 and *American Pipe*. Tribes relied on the *Cherokee Nation* class action to vindicate their rights, as Rule 23 encouraged them to do, and both *American Pipe* and *Crown* assured them that the statute of limitations on their claims was tolled. Once class certification was denied, most tribes with CSC shortfalls never filed their own claims at all. Only those tribes with the greatest shortfalls—those for which the potential rewards most exceeded the risks—pursued their claims individually. As a result, significant tribal, agency, board, and court resources were conserved. This is the point of judicial economy and the point of the tolling rule.

Under the Federal Circuit's interpretation, the CDA in the class action context operates as a trap. Contractors must file a timely claim under 605(a), and then "would *presumably* be entitled to class action tolling with regard to the time limitations on any subsequent individual challenge to the contracting officer's decision." Pet. App. 20a. (emphasis added). However, this presumption may not prove true. Once the contracting officer decided, and in this case denied the claims, tribes would have to appeal to the CBCA or a federal court to preserve the claims since the IHS would surely have argued that the limitations periods in the CDA sections 606 (Pet. App. 49a.) and 609(a)(3) (Pet. App. 50a.) could not be tolled. These provisions are arguably requirements for timing of review like that in *Bowles*, 551 U.S. 205, 212-13, although the question has not been resolved.[11] The *Cherokee Nation* class court took two

[11] *See e.g.*, 41 U.S.C. § 606, which requires an appeal to a board to be filed within 90 days and 41 U.S.C. § 609(a)(3), which

years to decide certification. If the Federal Circuit's presumption that the CDA appeal limitations may be tolled was wrong, then contractors who filed claims, had them denied, and did not file timely individual appeals could be left with no remedy– *whether the class was certified or not*.

Tolling ensures that unsuspecting class members do not lose significant due process rights. Wright, Miller, & Kane, § 1795. As this Court stated in *Crown*, "unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights." 462 U.S. at 350. Yet, this very possibility is present here. If the Federal Circuit is correct, the Community may have lost its rights because it relied on the existence of a class action. And there was reason to wait.

In the class action, *Cherokee Nation*, 199 F.R.D. 357 (E.D. Okla. 2001), the Government argued that those tribes who had filed separate administrative actions should be *excluded* from the class. *Id.* at 362. Clearly, if the Government believed that the putative class members were jurisdictionally required to exhaust administrative remedies, it could have made that argument in that class action. Instead it sought to segregate out of the class those who had actually filed administrative claims.

With the Government taking this position, putative class members were caught in a catch-22. Was filing

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requires an appeal to court to be filed in 12 months. *Compare Janicki Logging Co. v. United States*, 36 Fed. Cl. 338, *aff'd*, 124 F.3d 226 (Fed. Cir. 1996) (limitations not equitably tolled) and *International Air Response v. United States*, 302 F.3d 1363 (Fed. Cir. 2002)(limitations subject to tolling).

an administrative claim necessary to participate in the class action (as the Federal Circuit eventually held) or fatal to participation (as the Government argued in *Cherokee* and as the case may be if tolling of sections 606 and 609(a)(3) is unavailable)? This underscores the need for a clear and inclusive tolling rule. As this Court noted in *American Pipe*, class members should not be forced into the position of having to determine independently the nature of the statute, whether the class will be certified, when it will be certified (if at all), the consequences of filing a claim before the certification decision, and the consequences of *not* filing a claim before the decision. 414 U.S. at 553-54. Those in the putative class are absent class members under the protection of the court and they are entitled to remain passive until the class issues are resolved. Newberg on Class Actions, § 1:3. The rule of *American Pipe* is simple: the statute is tolled for *all* asserted members of the class. *Id.* at 554; *Crown*, 462 U.S. at 350.

CONCLUSION

The Federal Circuit ruling punishes the Community, as a putative class member, for relying on these precedents and circumstances and from following class action tolling rules as they were known at the time of the case. For the reasons stated herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1, 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-1532

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Appellant,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellee.

Appeal form the Civilian Board of Contract Appeals in case nos. 190 ISDA and 289-ISDA through 293-ISDA, Administrative Judge Candida S. Steel.

2008-1607, 2009-1004

CONFEDERATED TRIBES OF COOS, LOWER UMPQUA, AND SIUSLAW INDIANS,
Appellant,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellee.

METLAKATLA INDIAN COMMUNITY,
Appellant,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellee.

Appeals from the Civilian Board of Contract Appeals in case nos. 235-ISDA, 236-ISDA, 280-ISDA, and 281-ISDA, Administrative Judge Candida S. Steel.

DECIDED: September 29, 2009

Before MAYER, LOURIE, and BRYSON, *Circuit Judges.*

BRYSON, *Circuit Judge.*

The appellants in these three appeals are Indian tribes and tribal organizations that provide health care services to their members under contracts with the Indian Health Service ("IHS"). The contracts were entered into pursuant to the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. §§ 450-450n. The Civilian Board of Contract Appeals dismissed several of the appellants' contract claims against the IHS on the ground that the appellants had failed to present those claims to a contracting officer within six years after the claims accrued, as required by section 605(a) the Contract Disputes Act ("CDA"), 41 U.S.C. § 605(a).

Before the Board of Contract Appeals, the appellants argued that the CDA's six-year presentment period was tolled on either of two grounds. First, they argued that the statutory presentment period was subject to equitable tolling. Second, they argued that the period was legally tolled by the pendency of two class action lawsuits in which they were putative class members. The Board rejected both arguments. It held that the CDA's presentment period is a jurisdictional requirement that is not subject to tolling, either equitable or legal. We hold that the six-year

presentment period is subject to equitable tolling, but not class action tolling; we remand to the Board to determine whether this case satisfies the requirements of the equitable tolling doctrine.

I

The ISDA was enacted in 1975 to promote tribal autonomy by permitting Indian tribes to manage federally funded services that were previously administered by the federal government. *See* 25 U.S.C § 450a; *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 634 (2005). Transfers of federal programs to tribal control under the ISDA are accomplished through "self-determination contracts" under which a tribe agrees to take over administration of a federal program such as an IHS hospital or clinic. 25 U.S.C. § 450f(a). The government is required to provide self-determination contractors with the same amount of funding that would have been appropriated for the tribal programs if the government had continued to operate the programs directly. *Id.* § 450j-1 (a)(1).

As originally enacted, the ISDA did not require the government to pay the administrative costs that the tribes incurred to operate the programs. In many cases, contractors were forced to absorb those costs, thereby reducing the funds available for the tribes to provide direct services to their members. *See Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075, 1080 (Fed. Cir. 2003); S. Rep. No. 100-274, at 8-9 (1987). To remedy that problem, Congress amended the ISDA in 1988 to require the federal government to provide funds to pay the administrative expenses of covered programs. Those expenses included "contract support costs," defined in the statute as costs that a federal agency would not have directly incurred, but that tribal organizations acting

as contractors reasonably incur in managing the programs. 25 U.S.C. § 450j-1 (a)(2).

The 1988 amendments to the ISDA made the Contract Disputes Act applicable to disputes concerning self-determination contracts. 25 U.S.C. § 450m-1(d). As a result, ISDA self-determination contractors can appeal an adverse decision by a contracting officer on contract disputes to the Civilian Board of Contract Appeals, *see* 41 U.S.C. § 606, or to the Court of Federal Claims, *see* 41 U.S.C. § 609(a)(1). In addition, the ISDA permits contractors to bring claims in district courts, an avenue of relief that is generally unavailable to government contractors under the CDA. *See* 25 U.S.C. § 450m-1 (a).

After the 1988 amendments took effect, some ISDA contractors claimed that the government was still failing to meet its obligation to fully fund the contract support costs. Those allegations resulted in the filing of several class action lawsuits, two of which are pertinent to the cases before us. In the first of those suits, the Cherokee Nation of Oklahoma filed a complaint and a request for class certification on March 5, 1999, in the United States District Court for the Eastern District of Oklahoma. The plaintiffs alleged that they had entered into contracts with the IHS to provide tribal health care services, but that the government had refused to pay the full amount of the promised support costs because Congress had failed to appropriate sufficient funds to cover those costs. The complaint sought certification of a class comprising "[a]ll Indian tribes and tribal organizations operating IHS programs under [ISDA contracts] that were not fully paid their contract support costs needs, as determined by IHS, at any time between

1988 and the present." *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001).

On February 9, 2001, the district court denied class certification. The court subsequently ruled on the merits that the government was not obligated to provide contract support costs in excess of the amount appropriated by Congress for that purpose, *Cherokee Nation of Okla. v. United States*, 190 F. Supp. 2d 1248, 1259 (E.D. Okla. 2001), and the Tenth Circuit affirmed, *Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054, 1063 (10th Cir. 2002). After this court reached the opposite conclusion in another ISDA case, *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003), the Supreme Court granted certiorari to resolve the conflict. The Court subsequently held that the government could not avoid its contractual obligation to pay support costs to the plaintiff ISDA contractors on the ground that Congress had appropriated insufficient funds specifically designed to cover those costs, and that the government had to satisfy its contractual obligations out of other unrestricted appropriated funds. *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005).

In the second lawsuit, the Pueblo of Zuni filed a class action on September 10, 2001, in the United States District Court for the District of New Mexico, similarly contending that the government had failed to pay full support costs to contractors who were providing tribal health services pursuant to ISDA contracts with the IHS. The asserted class consisted of "all tribes and tribal organizations contracting with IHS under the ISDA between the years 1993 to the present." *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1105 (D.N.M. 2006). That action was stayed pending the outcome of the *Cherokee Nation*

litigation that was then on appeal to the Tenth Circuit. After the Supreme Court issued its *Cherokee Nation* decision, the stay in the Zuni case was lifted, and on May 22, 2007, the district court denied certification of the class. *Pueblo of Zuni v. United States*, 243 F.R.D. 436, 453 (D.N.M. 2007).

II

The Arctic Slope Native Association, Ltd. ("ASNA"), operates a federal hospital under an ISDA contract with the IHS. ASNA claims to have been a member of the putative class in the *Zuni* litigation. On September 30, 2005, after the Supreme Court's decision in the *Cherokee Nation* case and while the *Zuni* class action was still pending, ASNA filed CDA claims with an IHS contracting officer alleging that the IHS had failed to pay the full amount of the contract support costs that ANSA had incurred to operate the hospital during fiscal years 1996 through 2000.

The Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians ("Confederated Tribes") and the Metlakatla Indian Community also provide Indian health services pursuant to self-determination contracts with the IHS. They claim to have been members of the putative class in the *Cherokee Nation* action that was initiated in the Eastern District of Oklahoma. The Confederated Tribes filed claims with an IHS contracting officer on December 29, 2003, and September 27, 2004, seeking contract support costs for fiscal years 1995 through 1998; the Metlakatla Indian Community filed its claims with the an IHS contracting officer on June 30, 2005, seeking contract support costs for fiscal years 1995 through 1999.

The IHS contracting officers denied one claim and failed to act on the remaining claims, as a result of

which those claims were deemed denied. *See* 41 U.S.C.§ 605(c)(5). Each appellant then timely appealed to the Board of Contract Appeals. On July 28, 2008, the Board issued decisions in all three cases, holding that it lacked subject matter jurisdiction to consider those claims that the contractors had failed to submit to the contracting officers within six years of accrual, as mandated by the CDA. *See* 41 U.S.C. § 605(a).

Before the Board of Contract Appeals, the appellants argued that because they were members of the putative classes in either the *Cherokee Nation* or *Zuni* class actions, the six-year period for filing their administrative claims under section 605(a) of the CDA was legally tolled until class certification was denied in those cases. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). The appellants also argued that the six-year period should have been extended in light of equitable considerations. The Board, however, ruled in each of the three cases that the six-year period was not subject to either legal or equitable tolling. Section 605(a), the Board explained, "does not contain a statute of limitations which imposes a time limit for filing suit. Rather, it imposes a time limit which this Board's precedent establishes is a prerequisite to our jurisdiction." The Board therefore dismissed all of the claims at issue in these appeals for lack of jurisdiction.

III

Section 605(a) of the CDA provides as follows, in pertinent part:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer

> for a decision. . . . Each claim by a contractor against the government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim.

41 U.S.C. § 605(a). The statute further provides that the contracting officer's decision on the claim "shall be final and conclusive" unless review is sought by one of the specifically authorized means. *Id.* § 605(b). Section 606 of the CDA authorizes a contractor to appeal the decision of a contracting officer to an agency board of contract appeals within 90 days of the contractor's receipt of the decision. Section 609 of the Act gives the contractor the alternative of appealing the decision of the contracting officer to the Court of Federal Claims if the appeal is filed within 12 months of the receipt of the decision. The ISDA provides a third mechanism for review of decisions on contract claims, giving United States district courts jurisdiction over any claim for money damages arising under contracts authorized by the Act, subject to the proviso that the CDA shall apply to the resolution of disputes concerning self-determination contracts. 25 U.S.C. § 450m-1 (a), (d).

The government takes the position that, by virtue of the ISDA's incorporation of CDA procedures, the temporal scope of the waiver of sovereign immunity for the submission of ISDA administrative claims is six years, and that any claim not submitted to a contracting officer within that time period is jurisdictionally barred from further review, administrative or judicial. The appellants, on the other hand, assert that the six-year presentment period in section 605(a) can be equitably or legally tolled without exceeding the limits on the government's waiver of sovereign immunity. For the reasons

set forth below, we hold that the six-year time limit for filing a claim with a contracting officer is not subject to statutory class action tolling in this case. However, we conclude that the six-year time period is subject to equitable tolling.

A

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court adopted the principle of "class action tolling." The Court noted that under the Federal Rules of Civil Procedure, a class action complaint effectively begins the lawsuit and stops the running of the statute of limitations for all class members with respect to the asserted cause of action. Because it is unknowable at the time a class action is filed whether the class will be certified, the Court held that even when the district court denies class certification, the statute of limitations is suspended during the pendency of the class action proceedings. The Court held that the benefit of that suspension accrues not only to the named parties, but also to "all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.*; *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983).

In *Stone Container Corp. v. United States*, this court explained that the Supreme Court's decisions in *American Pipe* and *Crown, Cork & Seal* "were not based on judge-made equitable tolling, but rather on the Court's interpretation of Rule 23 [of the Federal Rules of Civil Procedure]," which governs class actions in federal district courts. 229 F.3d 1345, 1354 (Fed. Cir. 2000). Rule 23 is designed to avoid the "unnecessary filing of repetitious papers and motions" and to promote economy of litigation. *American* Pipe,

414 U.S. at 550, 553. If the commencement of a class action did not toll the statute of limitations for putative class members, each class member would be required to file a separate action prior to the expiration of that class member's own limitations period. The result, the Supreme Court has explained, "would be a needless multiplicity of actions--precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Crown, Cork & Seal*, 462 U.S. at 351.

The government contends that because the six-year time limit in section 605(a) is a condition on the waiver of sovereign immunity, it is a "jurisdictional statute [that is] not subject to judge-made class action tolling." Our decision in *Stone Container*, however, closes the door on that argument. In that case, we addressed the question whether Rule 23 of the Court of International Trade, which corresponds to Rule 23 of the Federal Rules of Civil Procedure, tolls the two-year statute of limitations on actions brought in that court pursuant to 28 U.S.C.§ 1581. *See* 28 U.S.C. § 636(i). Based on Congress's pronouncement that "[a]ll laws in conflict with [the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect," 28 U.S.C. § 2072(b), we concluded that Rule 23 is "as binding as any federal statute." *Stone Container*, 229 F.3d at 1354, quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988). We went on to explain that because Rule 23 "is statutory rather than equitable, it follows that the rule of *American Pipe* applies to the government just as it does to private parties." *Id.* The government's contentions that class action tolling cannot apply to a temporal limitation on actions against the government, and that class action tolling is "judge-made" rather

than statutory, therefore have no force in light of *Stone Container*.

The government's attempts to distinguish *Stone Container* are unavailing. Noting that the Civilian Board of Contract Appeals, unlike the Court of International Trade, does not have a class action provision corresponding to Rule 23 of the Federal Rules of Civil Procedure, the government suggests that for that reason class action tolling does not apply to claims before the Board. The government, however, has it backwards. The statutory authority for tolling the limitations period for a claim derives from the rule that provides the tolling, not from the rules of the court or board in which the tolling is asserted. Because the *Zuni* and *Cherokee Nation* class actions were brought in federal district court, the governing legal rule is Rule 23. The case for statutory class action tolling is even stronger here than in *Stone Container* because tolling in this case is required by Rule 23 and does not depend on a non-statutory court rule such as the class action rule of the Court of International Trade.

There is likewise no force to the government's reliance on our statement in *Stone Container* that the statute of limitations in the Court of International Trade specifically incorporates the rules of that court. The government suggests that Rule 23 tolling before the Board is "not 'legal' tolling" because section 605 (a) does not similarly confer statutory authority on the Board's rules. But, again, the governing rule here is Rule 23, not the rules of the Board. In *Stone Container*, it was important that the governing statute of limitations expressly incorporated the rules of the Court of International Trade because that court's rules, standing alone, are not statutory. Rule

23, however, is statutory. There is thus no need for section 605(a) to incorporate Rule 23 in order for Rule 23 to have binding legal effect.

Finally, the government asserts that because *Stone Container* "did not involve a jurisdictional statute of limitations," that decision does not support the application of class action tolling to CDA claims. The limitations statute at issue in *Stone Container*, however, constituted a waiver of sovereign immunity and thus defined the court's jurisdiction. *See Stone Container*, 229 F.3d at 1352; *see also Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) *(en banc)*. Nonetheless, this court held that the statute in question, 28 U.S.C.§ 2636(i), did not bar the application of class action tolling. Nothing in the language of section 2636(i) suggests that it is more amenable to tolling than section 605(a). Section 605(a) provides that a CDA claim against the government "shall be submitted within 6 years after the accrual of the claim." Section 2636(i) states that an action brought against the government in the Court of International Trade "is barred unless commenced . . . within two years after the cause of action first accrues." If anything, the "is barred" language of section 2636(i) is even more preclusive than the "shall be submitted" language of section 605(a). We therefore reject the government's sweeping contention that any time limitation, such as the limitation in section 605(a), which defines the matters that a board or court may adjudicate, is not subject to class action tolling because that provision is "jurisdictional" in nature.

B

There is more force to the government's alternative, and narrower, argument that the appellants are not

entitled to the benefit of class action tolling because their failure to present the disputed claims to a contracting officer within the six-year period provided in section 605(a) meant that they did not qualify as potential members of the plaintiff class with respect to those claims.

The six-year presentment period is part of the requirement in section 605(a) that all claims by a contractor against the government be submitted to the contracting officer for a decision. This court has held that the presentment of claims to a contracting officer under section 605(a) is a prerequisite to suit in the Court of Federal Claims or review by a board of contract appeals. *England v. Swanson Group*, 353 F.3d 1375, 1379 (Fed. Cir. 2004); *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993). Statutory time restrictions on the submission of administrative claims are a part of the requirement that a party must satisfy to properly exhaust administrative remedies. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006) ("Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules."). Therefore, subject to any applicable tolling of the statutory time period, the timely submission of a claim to a contracting officer is a necessary predicate to the exercise of jurisdiction by a court or a board of contract appeals over a contract dispute governed by the CDA.

The Confederated Tribes and the Metlakatla Indian Community did not present their claims to an IHS contracting officer for 1995-98 and 1995-99, respectively, until after class certification was denied in the *Cherokee Nation* action, more than six years after those claims accrued. ASNA presented its claims to the contracting officer during the pendency

of the *Zuni* class action, but it did not do so until 2005, more than six years after its causes of action had accrued for 1995-99. The government contends that the appellants' failure to present their claims to contracting officers within six years of accrual means that those claims could not have been litigated in the *Zuni* and *Cherokee Nation* class actions even if those suits had been permitted to continue. Consequently, the government argues, the class action tolling rule does not apply to the appellants' claims.

The appellants argue that they are entitled to the benefits of the class action tolling rule despite their not having timely presented the disputed claims to contracting officers. They rely on a line of cases in which courts have held, in actions brought under Title VII of the Civil Rights Act of 1964, that an individual claimant need not exhaust administrative remedies to obtain a backpay award in a class action lawsuit, *see Albermarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975), and that the filing of a class action complaint therefore tolls the applicable statute of limitations as to all asserted members of the class who would have been parties if the suit had been permitted to continue as a class action, *see Griffin v. Singletary*, 17 F.3d 356, 360-61 (11th Cir. 1994); *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988); *Sharpe v. Am. Express Co.*, 689 F. Supp. 294 (S.D.N.Y. 1988); *see also Oscar Mayer & Co. v. Evans*,441 U.S. 750, 758 n.6 (1979) (same rule applicable in representative actions under the Age Discrimination in Employment Act).

That line of cases is inapplicable here, however, because it is predicated on the Supreme Court's holding, in the *Albermarle Paper Co.* case, that Title VII permits an individual to be a class member and

receive a backpay award in a class action suit even though that individual has not exhausted applicable administrative remedies under the Act. *See also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982). As the Supreme Court has made clear, that principle derives from the specific language and legislative history of Title VII. *See Albermarle Paper Co.*, 422 U.S. at 414 n.8.

Under other statutes, both the Supreme Court and the lower courts have held that a party that has not exhausted administrative remedies is not eligible to be a class member. For example, in cases involving classwide challenges to decisions by the Social Security Administration pursuant to section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), the Supreme Court has held that asserted class members who were not alleged to have filed a timely administrative application for relief are not eligible to be members of the class and that the district court was "without jurisdiction over so much of the complaint as concerns the class." *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975); *see also Califano v. Yamasaki*, 442 U.S. 682, 703-04 (1979) (class certification that included claimants who failed to file administrative claim for relief was "plainly too broad"); *Mathews v. Eldridge*, 424 U.S. 319 (1976) ("requirement that a claim for benefits shall have been presented to the Secretary" is nonwaivable and jurisdictional).[1]

[1] The plaintiffs rely on *McDonald v. Sec'y of Health & Human Servs.*, 834 F.2d 1085 (1st Cir. 1987), in which the First Circuit allowed class action tolling in a class action under the Social Security Act, but that decision is not helpful to them. The court was careful to note that in that case all class members had satisfied the requirement of presenting a claim of benefits to the

Similarly, in class actions brought under the Federal Tort Claims Act ("FTCA"), the courts have uniformly held that a district court does not have jurisdiction over asserted class members who have not complied with the FTCA's administrative claim presentment requirements, and that the court lacks power to include those parties in the certified class. *See In re "Agent Orange" Prod. Liability Litig.*, 818 F.2d 194, 198 (2d Cir. 1987); *Lunsford v. United States*, 570 F.2d 221, 224-27 (8th Cir. 1977); *Commonwealth of Pa. v. Nat'l Ass'n of Flood Insurers*, 520 F.2d 11, 23 (3d Cir. 1975). The court in the *Lunsford* case distinguished the different rule applied in actions under Title VII, noting that unlike actions under Title VII, suits under the FTCA are not "inherently class actions," and that the administrative agency in FTCA cases is given broad authority to settle cases, while the EEOC, the administrative agency to which administrative claims are submitted under Title VII, has only the authority to conciliate, not the authority to settle claims. In light of those distinctions, the instant cases are much more akin to the FTCA cases than to the Title VII cases: Contract disputes are not "inherently class actions," even though there may be legal issues in contract cases that are common to multiple contractors and multiple claims, and the agencies to which claims are presented under the CDA have broad settlement authority, not merely the power to conciliate.[2]

Secretary, and for that reason the district court had the authority to grant relief to those class members. *Id.* at 1092 n.4.

[2] The FTCA cases cannot be distinguished from this case on the ground that the presentment requirement under section 605(a) is not as rigid as the presentment requirement in the FTCA; to the contrary, although the presentment requirement

Finally, the Court of International Trade has held that the court lacks the authority under 28 U.S.C. § 1581 (a) to exercise jurisdiction over asserted class members who have failed to complete the required administrative protest process under section 515 of the Tariff Act of 1930. *Nu-Farm America's, Inc. v. United States*, 398 F. Supp. 2d 1338, 1352-53 (Ct. Int'l Trade 2005). The court explained that the rationale of class action tolling–that the filing of the class action complaint ends the running of the statute of limitations as to all putative class members–does not apply to parties over whom the court has no authority to exercise jurisdiction, even if those parties' claims resemble the claims of the class members. For that reason, the court held that class action tolling is not available to a party who, because of failure to comply with a mandatory requirement to exhaust administrative remedies, could not be a class member if the class were certified. *Id.* at 1353-54.

In light of those authorities, the key question in determining whether class action tolling applies to

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in the FTCA, like the presentment requirement in section 605(a), is frequently referred to as "jurisdictional," a majority of the courts of appeals have held that it is nonetheless subject to equitable tolling in appropriate cases. *See T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 961 (8th Cir. 2006) ("[C]onsiderations of equitable tolling simply make up part of the court's determination whether an action falls within the scope of the waiver of sovereign immunity granted by Congress, and thus within the jurisdiction of the federal courts."), *see also Santos ex rel. Beato v. United States*, 559 F.3d 189, 194- 95 (3d Cir. 2009); *Ramirez Carlo v. United States*, 496 F.3d 41, 49 (1st Cir. 2007); *Glarner v. U.S. Dep't of Veterans Admin.*, 30 F.3d 697 (6th Cir. 2004); *contra Marley v. United States*, 567 F.3d 1030 (9th Cir. 2009).

this case is whether, with respect to the claims here in dispute, those parties who failed to make a timely presentment of their claims to a contracting officer would have been eligible to be class members if the *People of Zuni* and *Cherokee* Nation cases had continued as class actions. We conclude that they would not. The courts that have addressed the question have held that an ISDA claimant that has not presented its claim to a contracting officer pursuant to the CDA cannot be a class member in an ISDA class action. *See Menominee Indian Tribe of Wis. v. United States*, 539 F. Supp. 2d 152 (D.D.C. 2008); *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1113-14 (D.N.M. 2006); *Ramah Navajo Sch. Bd., Inc. v. United States*, 83 Fed. Cl. 786 (2008).[3] Those decisions are consistent with the decisions cited above, holding that a party's failure to exhaust mandatory administrative remedies bars the court from treating that party as a class member. In that setting, class action tolling does not apply because the party that failed to comply with the statutory requirement to present its claims to a contracting officer would not have satisfied the requirement, set forth in *American Pipe*, making class action tolling available "to all asserted members of the class who

[3] The plaintiffs rely on an unpublished decision of the district court in *Ramah Navajo Chapter v. Lujan*, No. Civ 90-0957 (D.N.M. Oct. 1, 1993), as standing for the opposite proposition, but the court in that case did not adopt the general principle that asserted class members need not exhaust their administrative remedies in an ISDA contract case. Instead, the court held that exhaustion of administrative remedies was not required under the circumstances of that case because it would have been futile. The appellants have not argued that any "futility" exception excuses their failure to make timely presentments of the disputed claims to the contracting officers.

would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554.

Class action tolling is unavailable in this situation for another reason as well. Part of the rationale underlying class action tolling is that putative class members should be treated the same as actual parties to the litigation. *See American Pipe*, 414 U.S. at 551 ("the claimed members of the class stood as parties to the suit until and unless they received notice and chose not to continue"). Yet to hold that the plaintiffs are entitled to tolling in this case based on their status as asserted class members would put them in a better position than they would have been in if they had actually been named parties in the *Zuni* and *Cherokee Nation* actions. If they had directly joined or intervened in those actions without previously presenting their claims to a contracting officer, those claims would have been subject to dismissal for failure to comply with the presentment requirement of section 605(a). Nor would the filing and pendency of their action in the district court have tolled the six-year presentment period. *See Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1981) (FTCA presentment period not tolled by premature filing of civil action); *Denton v. United States*, 638 F.2d 1218, 1221 n.5 (9th Cir. 1981) (same); *Miller v. United States*, 418 F. Supp. 373, 378 (D. Minn. 1976)[4] .4 Thus, if the six-year

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[4] Recognizing that non-tolling in such cases is the ordinary rule, Congress in 1988 amended the FTCA to allow for tolling in certain cases–where the United States is substituted as the party defendant and the action is dismissed for failure first to present an administrative claim. *See* 28 U.S.C. § 2679(d)(5). No statutory provision under the CDA or the ISDA allows for tolling of the presentment period when a premature action is filed before the Board or a court.

presentment period had lapsed while the two actions were pending, the plaintiffs' claims would be lost. Given that outcome in the hypothetical situation in which the plaintiffs directly participated in the two actions, it would make no sense to hold that they would be better off with respect to tolling rights if their participation in the two actions were limited to the status of asserted class members.

The plaintiffs argue that not allowing class action tolling in this situation would have the effect of making class actions unavailable in contract cases under the ISDA. As ASNA puts it, adopting that rule would "guarantee[] that no class action can ever exist in contract litigation" arising under the Act. That is plainly an overstatement, as it conflates the requirement of timely presentment to a contracting officer with the subsequent challenge to a contracting officer's adverse decision before a court or board. Requiring each potential class member to exhaust administrative remedies with respect to all claims that are subject to classwide relief is not the same as requiring that the potential class member take the further, and burdensome, step of individually challenging each contracting officer decision before a court or board. Once a party has submitted a timely claim to a contracting officer and the contracting officer has rejected the claim, either expressly or by failing to act on it in the statutorily prescribed period, the claimant would be eligible to benefit from classwide relief and would presumably be entitled to class action tolling with regard to the time limitations on any subsequent, individual challenge to the contracting officer's decision.

There is also no force to the plaintiffs' argument that the effect of rejecting class action tolling in these

cases would be that tolling would be available only when a class is certified, which is precisely when tolling for individual actions is unnecessary. That argument overlooks the main point of class action tolling, which is to provide protection against the running of the statute of limitations for parties who could potentially be included as class members in a class action, but who are ultimately left outside the class, by a court's decision not to certify the class or to certify a narrow class that does not include them. *See American Pipe*, 414 U.S. at 553-54. That rationale would protect any potential class member over whom the court could exercise jurisdiction by class certification, but not parties, such as those who have failed to exhaust mandatory administrative remedies, over whom the court may not exercise jurisdiction.

It is true that the rule we adopt would require parties to devote resources to the submission of claims to contracting officers prior to the classwide resolution of the legal issues in the case, and that under the contrary rule advocated by the plaintiffs such an expenditure of resources would ultimately be necessary only if the plaintiffs prevailed on their legal argument in the class action court. As the claim letters in the record in this case show, however, such submissions to the contracting officer need not be elaborate. Moreover, where, as here, the various parties' claims all depend on a single legal theory—which will normally be the case when those claims are amenable to class action treatment—little separate effort will have to be devoted to each claim apart from identifying the amount of the claim. At the same time, the submissions serve the useful function of apprising the government of the amount that is potentially at issue in the class action suit, which promotes the notice function that is part of the

justification for the presentment requirement in the first place. We therefore do not detect any compelling policy justification for extending the rule of class action tolling to this case; instead, we follow the principle set forth in the cases cited above and hold that class action tolling is not available to parties such as the plaintiffs in these cases, who have not made a timely presentation of their claims to a contracting officer.[5]

C

In the alternative, the plaintiffs contend that they are entitled to suspension of the six-year limitations period of section 605(a) under the doctrine of equitable tolling. We agree with the plaintiffs that equitable tolling applies to that six-year time limitation, and we remand for the Board to determine whether, on the facts of these cases, the appellants have established their entitlement to suspension of the limitations period.

The appellants first argue that the CDA's six-year presentment period is subject to equitable tolling under the principle articulated by the Supreme Court in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). In that case, which involved an employment discrimination action against the federal government,

[5] There is no merit to the plaintiffs' argument that the Board erred in relying on the definition of the term "claim" in the Federal Acquisition Regulation ("FAR") rather than looking to the ISDA regulations. The Board's decision was not based on the plaintiffs' having filed something that did not qualify as a "claim" under the FAR but would have qualified as a "claim" under the ISDA regulations. The problem is that the plaintiffs filed nothing with the contracting officers within the six years of accrual of the claims at issue that could qualify as a "claim" under any definition.

the Court held that, as a general rule, "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. The key question under *Irwin* is whether "there [is] a good reason to believe that Congress did not want the equitable tolling doctrine to apply." *United States v. Brockamp*, 519 U.S. 347, 350 (1997) (emphasis in original); *see Young v. United States*, 535 U.S. 43, 49-50 (2002); *Kirkendall v. Dep't of the Army*, 479 F.3d 830, 836-37 (Fed. Cir. 2007) (en banc). The appellants assert that there is no reason in the context of section 605(a) to depart from the presumption that equitable tolling applies to the six-year presentment period in that statute.

For its part, the government contends that section 605(a) is the type of statute that the Supreme Court, in *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008), held is not subject to equitable tolling. In that case, the Court held that 28 U.S.C.§ 2501, the statute of limitations governing suits against the United States in the Court of Federal Claims, set forth an "absolute" time limit that could not be extended based on equitable considerations. 128 S. Ct. at 753-54. In so ruling, the Court relied on a long line of prior decisions holding that the Court of Claims' limitations statute could not be equitably tolled. The government asserts that section 605(a) is more akin to section 2501 than to the statute at issue in *Irwin*, and that the time limitation of section 605(a) is therefore not subject to equitable tolling in light of *John R. Sand & Gravel*.

While it is not always easy to determine whether equitable tolling is available under particular statutes of limitations for actions against the government, our

precedents and those of the Supreme Court persuade us that equitable tolling applies to the six-year time limitation set forth in section 605(a). Importantly, the *Irwin* presumption applies, which means that we must assume that Congress intended equitable tolling to be available unless there is good reason to believe otherwise. Unlike in the case of section 2501, there is no long history of case law holding that the time limitation of section 605(a) is absolute; in fact, the issue is one of first impression for this court. Moreover, the time limitation in section 605(a) is of relatively recent vintage. In fact, Congress adopted that time limitation after the decision in *Irwin*, and it is therefore reasonable to construe the statute in light of the general presumption set forth in *Irwin*. *See Young*, 535 U.S. at 49-50 ("[L]imitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle."). The rationale of *John R. Sand & Gravel*, that the Court had long treated the time limitation of section 2501 as not amenable to equitable tolling, and that the Court was not prepared to disregard principles of *stare decisis* with respect to its prior rulings on the same statute, is therefore inapplicable here.

Beyond that, the Supreme Court and this court have identified several factors as instructive in determining whether a particular time limitation is subject to equitable tolling. The Supreme Court discussed those factors in *United States v. Brockamp*, 519 U.S. 347, 350-53 (1997), and this court subsequently summarized the "*Brockamp* factors" as calling for analysis of "the statute's detail, its technical language, its multiple iterations of the limitations period in procedural and substantive form, its explicit

inclusion of exceptions, and its underlying subject matter." *Kirkendall*, 479 F.3d at 836-37.

Application of those factors here strongly supports the conclusion that the time limitation of section 605(a) is amenable to equitable tolling. The statutory time limitation of section 605(a) is a simple provision and does not contain technical language. It provides in the simplest terms that each claim by a contractor "shall be submitted within 6 years of the accrual of the claim." Nor does section 605(a) contain any explicit exceptions to the six-year limitation period on claim submissions by contractors. The Supreme Court has noted that where such express statutory exceptions are present, they provide a basis for inferring that Congress may not have intended other, unspecified exceptions to apply. *Brockamp*, 519 U.S. at 352. The government argues that the statute contains an express exception, in that it provides that the six-year period shall not apply to claims by the government based on contractor claims involving fraud. That exception, however, applies only to claims by the government; the inference that Congress did not intend any implied exceptions to the six-year period for contractors to submit their claims is not as strong as it would be if there were any express exceptions applicable to contractors' claims.

Of course, a central factor in determining whether a particular statute is subject to equitable tolling is the language used to set forth the time limitation. The more emphatic the language, the less likely it is that Congress contemplated that the time limitation would be subject to implied exceptions. The language of the time limitation in section 605(a) is anything but emphatic; it simply states that the claim "shall be submitted" within six years. That formulation is less

pointed than the language at issue in *Kirkendall*, where the two statutes at issue provided that a complaint "must be filed within 60 days" and that an appeal shall be filed in accordance with prescribed procedures, but "in no event may any such appeal be brought" more than 15 days after receipt of notification of an administrative denial. Despite that seemingly preclusive statutory language, this court concluded that the *Irwin* presumption had not been overcome as to either limitations period. Accordingly, with regard to the language of the limitations period, the availability of equitable tolling in this case would seem to follow *a fortiori* from the court's analysis in *Kirkendall*.[5]

In sum, while we agree with the government that class action tolling does not apply to the claims at issue in these cases, we do not agree that the limitations period in section 605(a) is absolute and not subject to equitable tolling. We remand for a determination as to whether, under the circumstances of these cases, the limitation period should be tolled.

No costs.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

[5] Section 605(a) is in the nature of a statute of limitations, not a statute that governs the timing of review. The Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), and the pending en banc proceeding in *Henderson v. Shinseki*, No. 2009-7066, therefore do not control the disposition of the equitable tolling issue in this case.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2008-1607, 2009-1004

CONFEDERATED TRIBES OF COOS, LOWER UMPQUA, AND SIUSLAW INDIANS,
Appellant,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellee.

METLAKATLA INDIAN COMMUNITY,
Appellant,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellee.

Appeals from the Civilian Board of Contract Appeals in case nos. 235-ISDA, 236-ISDA, 280-ISDA, and 281-ISDA, Administrative Judge Candida S. Steel.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellants, and a response thereto having been invited by the court and filed by the Appellee, and the petition for

rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on March 17, 2010.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: 03/10/2010

cc: Geoffrey D. Strommer
Sameer Yerawadekar

CONFEDERATED TRIBES V HHS, 2008-1607, 2009-1004 (BCA - 235-ISDA; 236-ISDA)

APPENDIX C

[Logo] UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 181-ISDA, 279-ISDA, 280-ISDA,
281-ISDA, 282-ISDA

METLAKATLA INDIAN COMMUNITY,
Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

MOTION TO DISMISS GRANTED AS
TO CBCA 280-ISDA AND 281-ISDA AND
DENIED AS TO CBCA 181-ISDA, 279-ISDA,
AND 292-ISDA: July 28, 2008

Geoffrey D. Strommer of Hobbs, Straus, Dean & Walker, LLP, Portland, OR, counsel for Appellant.

Melissa Jamison, Office of the General Counsel, Department of Health and Human Services, Rockville, MD, counsel for Respondent.

Before *Board Judges* HYATT, DeGRAFF, and STEEL.

STEEL, *Board Judge*.

For all the years at issue in these appeals, the Metlakatla Indian Community (Metlakatla) provided health care services to its members under self-determination contracts or compacts with the Department of Health and Human Services (HHS) Indian

Health Service (IHS), pursuant to the Indian Self-Determination and Education Assistance Act (ISDA or Act), Pub. L. No. 93-638, codified as amended at 25 U.S.C. §§ 450, *et seq.* (2000). Metlakatla seeks additional amounts of indirect contract support cost (CSC) funding from IHS under ISDA contracts and compacts in fiscal years (FYs) 1995 through 1999. IHS moves to dismiss the appeals.

Background

In 1975, Congress enacted the ISDA to encourage Indian self-government by allowing the transfer of certain federal programs operated by the Federal Government, including health care services programs, to tribal governments and other tribal organizations by way of contracts. The amount of contract funds provided to the tribes was the same as the amount IHS would have provided if it had continued to operate the programs. This amount is known as the "Secretarial amount" or "tribal shares." 25 U.S.C. § 450j-1(a). The Secretarial amount, however, included only the funds IHS would have provided directly to operate the programs. It did not include funds for additional administrative costs the tribes incurred in running the programs, but which IHS would not have incurred, such as the cost of annual financial audits, liability insurance, personnel systems, and financial management and procurement systems. S. Rep. No. 100-274, at 8-9 (1987).

In 1988, Congress amended the ISDA to authorize IHS to negotiate additional instruments, self-governance "compacts," with a selected number of tribes. Pub. L. No. 100-472, tit. II, § 201(a), (b)(1), 102 Stat. 2288, 2289 (1988); *see* 25 U.S.C. § 450f note (repealed by Pub. L. No. 106-260, § 10, 114 Stat. 711, 734 (2000)). Under this more flexible Tribal Self-

Governance Demonstration Project, the selected tribes were given the option of entering into either contracts or compacts[1] with IHS to perform certain programs, functions, services, or activities (PFSAs) which IHS had operated for Indian tribes and their members. If a tribe and IHS entered into a compact, they also entered into annual funding agreements (AFAs).

The 1988 amendments also provided for funding for the additional administrative costs which tribes incurred in running health services programs. The statute as amended provides that there shall be added to the Secretarial amount contract support costs "which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 450j-1(a)(2). These amounts are for "costs which normally are not carried on by the respective Secretary in his direct operation of the program; or . . . are provided by the Secretary in support of the contracted program from resources other than those under contract." *Id.*

There are three categories of CSC: start-up costs, indirect costs (IDC), and direct costs. Start-up costs are one-time costs necessary to plan, prepare for, and assume operation of a new or expanded PFSA, such as the start-up costs for a new clinic. Indirect costs are those costs incurred for a common or joint purpose, but benefiting more than one PFSA, such as administrative and overhead costs. Direct CSC are expenses which are directly attributable to a certain PFSA but

[1] For the purposes of this decision, there are no significant differences between contracts and compacts.

which are not captured in either the Secretarial amount or indirect costs, such as workers' compensation insurance, which the Secretary would not have incurred if the agency were operating the program. 25 U.S.C. § 450j-1(a)

The provision of funds for CSC is "subject to the availability of appropriations," notwithstanding any other provision in the ISDA, and IHS is not required to reduce funding for one tribe to make funds available to another tribe or tribal organization. 25 U.S.C. § 450j-1(b).

From one fiscal year to the next, IHS cannot reduce the Secretarial amount and the CSC it provides except pursuant to:

> (A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;
>
> (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
>
> (C) a tribal authorization;
>
> (D) a change in the amount of pass-through funds needed under a contract; or
>
> (E) completion of a contracted project activity or program.

25 U.S.C. § 450j-1(b)(2).

IHS is required to prepare annual reports for Congress regarding the implementation of the ISDA. Among other things, these reports include an accounting of any deficiency in the funds needed to provide contractors with CSC. 25 U.S.C. § 450j-1(c). The reports which set out the deficiencies in funds

needed to provide CSC are known as "shortfall reports." Complaint ¶ 14; 25 U.S.C. § 450j-1(c), (d). Each IHS Area Office, including the Alaska Area Office, prepared shortfall reports for FYs 1995 - 1999 which were submitted to Congress. Complaint ¶ 14; Answer ¶ 14.

For FYs 1995 through 1998, Congress set aside $7.5 million of IHS's appropriated funds into the Indian Self-Determination (ISD) fund which were to be used for the transitional costs of new or expanded tribal programs. Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, tit. II, 108 Stat. 2499, 252.8 (1994); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996) ; Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-12 (1996); Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1582 (1997). In connection with the ISD fund, IHS developed a policy for funding CSC for new or expanded programs. IRS established a priority list, called the "queue," and funded CSC for new or expanded programs on a first-come, first-served basis, as determined by the date on which IHS received a tribe's request for funding. *See, e.g.*, IHS Circular No. 96-04, § 4.A(4)(a)(ii). Thus, IHS would fund the first request it received for funding CSC for a new or expanded program, then it would fund the next request it received, and it would continue funding CSC requests until the ISD funds were exhausted for a fiscal year. Requests not funded during one fiscal year moved up the queue to be paid when the next fiscal year's funds were distributed. Appeal File, Exhibit 4-29, Indian Self-Determination Memorandum (ISDM) 92-2 ¶ 4-C(1), at 4.

One of the 1988 amendments to the ISDA provided that the Contract Disputes Act (CDA) "shall apply to self-determination contracts." 25 U.S.C. § 450m-1(d). In 1994, Congress amended the Contract Disputes Act to include a six-year time limit for presenting a claim to the contracting officer (often an awarding official in the ISDA context):

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision . . . . Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud.

41 U.S.C. § 605(a).

Findings of Fact

In 1988, Metlakatla entered into contract no. 243-88-0184 for "various Health and Related Services for Alaska Natives, Annette Island Reserve." Appeal File, Exhibit 2 at 3-1. For Fiscal Year 1995, effective October 1, 1994, amendment no. 54 modified the original contract and extended the period of performance to cover the period from October 1, 1994, through September 30, 1995. *Id.* at 4-1.

On April 1, 1995, Metlakatla and IHS entered into a new Self Determination Contract, no. 243-95-6001, together with attachment 2, the applicable AFA, to deliver health services from April 1 to September 30, 1995. Appeal File, Exhibits 5, 6. The AFA for FY

1996, amendment 8 to contract 243-95-6001, was signed on September 28, 1995, with an effective date of December 1, 1995. *Id.*, Exhibit 11.

The "Alaska Tribal Health Compact between Certain Alaska Native Tribes and the United States of America" (ATHC) and related negotiated AFAs authorized thirteen Alaskan tribes to operate health care programs. Appeal File, Exhibit 2 at 15-1. Metlakatla joined the ATHC for FY 1997 and the years thereafter. Complaint ¶ 1; Appeal File, Exhibits 15-18.

On August 19, 1999, Metlakatla submitted a claim for unpaid CSC in the amount of $132,878 ($44,033 in CSC funding for tribal shares and $88,845 to defray start-up costs for a new or expanded program). IHS denied the claim on April 17, 2000, and Metlakatla did not appeal IHS' s decision. Metlakatla agrees it is too late to appeal this decision. Appellant's Response to Respondent's Motion to Dismiss at 10. Although the claim was submitted in FY 1999, the claim and the awarding official's decision say these amounts were contained in the FY 1997 AFA and repeated in the AFAs for FY 1998 and FY 1999.

Metlakatla's FY 1995 claim is dated June 30, 2005 and was received by the awarding official on July 1, 2005. Appeal File, Exhibits 2 at 1, 20 at 1. The claim was for $114,191, which is the amount listed on the shortfall report. *Id.*

Metlakatla's FY 1996 claim is dated June 30, 2005, and was received on July 1, 2005. Appeal File, Exhibits 2 at 4, 20 at 1. The claim was for $155,632, which is the amount listed on the shortfall report. *Id.*

Metlakatla's FY 1997 claim is dated June 30, 2005, and was received on July 1, 2005. Appeal File, Exhibit 2 at 8. The claim was for $262,116, which is $230,980

listed on the shortfall report, plus $24,230 listed in the queue and not accounted for in the shortfall report, and $6906 in additional indirect CSC. *Id.* at 4.

Metlakatla's FY 1998 claim is dated June 30, 2005, and was received on July 1, 2005. The claim was for $134,767, which included funds for CSC for ongoing programs. Appeal File, Exhibits 2 at 10, 20 at 2. The amount listed on the shortfall report was $128,396. *Id.*

Metlakatla's FY 1999 claim is dated June 30, 2005, and was received on July 1, 2005. The claim was for either $119,429, which is based upon a contract theory of recovery which assumes the appropriation for FY 1999 is capped and which seeks to recover for a breach of statutory sections which are incorporated in the compact, or $211,330, which is based upon a theory of recovery which challenges the applicability of the appropriations cap and which asks for the amount listed on the shortfall report. Appeal File, Exhibits 2 at 15, 20 at 2.

Except for the denial of the August 19, 1999 claim, the contracting officer did not issue decisions on these claims. They are therefore deemed denied. 41 U.S.C. § 605(c)(5). Appeals were filed with the Department of the Interior Board of Contract Appeals on May 8, 2006, and docketed as cases IB CA-4767/2006 through IBCA-4771/2006. On January 6, 2007, the Department of the Interior Board of Contract Appeals was merged with other civilian agency boards into the Civilian Board of Contract Appeals (CBCA), where the cases were docketed as described below. Pub. L. No. 109-163, § 847, 119 Stat. 3136 (2006).

Discussion

In their briefs, the parties make a great many arguments, all of which we carefully considered. Due

to the manner in which we resolve the issues before us, it is not necessary for us to address each of the arguments they raised in order to resolve the motion to dismiss. As explained below, laches does not bar Metlakatla's FY 1995 claim and we possess jurisdiction to consider the FY 1996 claim. We lack subject matter jurisdiction to consider the FY 1997 and FY 1998 claims. We possess subject matter jurisdiction to consider the FY 1999 claim and we cannot dismiss it for failure to state a claim upon which relief can be granted. Therefore, we grant the motion to dismiss, in part.

FY 1995 (CBCA 181-ISDA)

The parties agree that the claim for FY 1995 accrued on the last day of the fiscal year, which was September 30, 1995, since appellant could expect no further payments for the fiscal year after that date. On June 30, 2005, Metlakatla submitted this claim to the awarding official. In its motion to dismiss, IHS raises the equitable defense of laches in response to the claim for FY 1995 CSC.[2]

In order to persuade us to apply a laches defense, IHS must establish that Metlakatla delayed submitting its claim for an unreasonable and inexcusable length of time and that this delay resulted in prejudice or injury to the Government. *Aukerman Co.*

[2] Usually, the equitable defense of laches is resolved upon motion for summary judgment or relief or, where there are genuine facts in dispute, following trial. *A. C. Aukerman Co. v. R. L. Chaides Construction Co.*, 960 F.2d 1020 (Fed. Cir. 1992) (en banc), *Houston Ship Repair, Inc. v. U.S. Department of Transportation*, DOT BCA 4505, 06-2 BCA 111 33,381; *2160 Partners v. General Services Administration*, GSBCA 15973, 03-2 BCA 9132,269. However, IHS raised the issue in its motion to dismiss, and we address it here.

v. RL. Chaides Construction Co., 960 F.2d 1020, 1032 (Fed. Cir. 1992) (en banc); *Cornetta v. Lehman*, 851 F.2d 1372, 1377-78 (Fed. Cir. 1988) (en banc); *SUFI Network Services, Inc.*, ASBCA 55948, 08-1 BCA 9133,766 at 167,149; *Systems Integrated*, ASBCA 54439,05-2 BCA1 32,978 at 163,380. IHS can establish the existence of undue delay and prejudice either by establishing there is a presumption of laches or by offering actual proof of undue delay and prejudice. *Aukerman*, 960 F.2d at 1036.

Relying upon *Aukerman*, IHS asks us to decide that a presumption of lathes exists because Metlakatla failed to submit its claim to the awarding official within the six-year time limit contained in section 605(a) of the CDA. In addition, IHS says Metlakatla waited an unreasonable and inexcusable length of time to submit the claim to the contracting officer, and says its ability to defend against Metlakatla's claim has been prejudiced by the delay. Respondent's Motion to Dismiss at 16-18.

We do not need to decide whether we should create a presumption of laches based upon the six-year time limit contained in section 605(a) of the CDA because even if we were to do so, we would conclude Metlakatla has eliminated the presumption by offering proof to show its delay was excusable. Metlakatla has shown its delay was the result of other litigation, which is one of the reasons the Court in *Aukerman* recognized as justifying a delay. *Aukerman*, 960 F.2d at 1033, 1038.

On March 5, 1999, the Cherokee Nation of Oklahoma filed a complaint against IHS in the United States District Court for the Eastern District of Oklahoma. The tribe requested certification of a class consisting of "all Indian tribes and tribal organizations operating

Indian Health Service Programs under [the ISDA] that were not fully paid their contract support cost needs. . . ." *Cherokee Nation of Oklahoma v. United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001) (hereinafter *Cherokee Nation of Oklahoma*). Nearly two years later, on February 9, 2001, the court denied the request for class certification. Metlakatla asserts that it was a putative class member in this lawsuit, and the Government has not disputed this fact. Appellant's Response to Respondent's Motion to Dismiss at 5-6. Further, Metlakatla plausibly suggests that the basis for its FY 1995 claim was uncertain until the Supreme Court issued its decision in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). Metlakatla submitted its claim to the awarding official approximately four years after the request for class certification was denied in *Cherokee Nation of Oklahoma*, and approximately two months after the Supreme Court's decision in *Cherokee Nation*. The existence of this other litigation provides Metlakatla with an excuse for its delay such as would eliminate any presumption of laches.

After reviewing IHS's actual proof of unreasonable delay and prejudice, we find it lacking. Regarding delay, the existence of the litigation discussed in the preceding paragraph counters IHS's proof that Metlakatla unduly delayed submitting its claim to the awarding official. Regarding prejudice, IHS says it has been prejudiced by witnesses retiring from the agency and by its inability to locate relevant documents. Respondent's Reply to Appellant's Response to Motion to Dismiss at 16-17. These statements are allegations of counsel, however, and are not evidence. In addition, although witnesses may have retired, this does not mean they are unavailable to testify. *Hoover v. Department of the Navy*, 957 F.2d 861, 863-

64 (Fed. Cir. 1992). Moreover, the pendency of the litigation discussed above ought to have alerted HHS to the need to preserve relevant documents for tribes which might become class members.

HHS has failed to persuade us that we should apply a laches defense and bar the claim for FY 1995 CSC. Even if we were to create a presumption of laches based upon section 605(a) of the CDA, Metlakatla has eliminated the presumption by providing a valid excuse for its delay. HHS's actual proof of unreasonable delay and prejudice is insufficient to convince us to exercise our discretion in its favor. Therefore, we deny the motion to dismiss the FY 1995 claim on the grounds of laches.[3]

FY 1996 (CBCA 279-ISDA)

HHS moves to dismiss Metlakatla's FY 1996 claim for lack of subject matter jurisdiction because Metlakatla failed to submit this claim to the awarding official within six years after it accrued, as required by section 605(a) of the CDA. Respondent's Motion to Dismiss at 11. In resolving HHS's motion, we assume all well-pled factual allegations are true and find all reasonable inferences in favor of the non-moving party. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (stating that decisions on such motions to dismiss rest "on the assumption that all the allegations in the complaint are true"); *Leider v.*

[3] *But see Menominee Indian Tribe of Wisconsin v. United States*, No. 1:07cv 00812 (D.D.C. Mar. 24, 2008), *reconsideration denied* (Apr. 30, 2008), in which the district court dismissed the Menominee Indian Tribe's CSC claim for FY 1995 on the grounds that the claim was barred by laches. The Board is not bound by this decision and we reach a contrary conclusion after considering the arguments raised and facts presented to us.

United States, 301 F.3d 1290, 1295 (Fed. Cir. 2002); *Gould Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Kawa v. United States*, 77 Fed. Cl. 294,298 (2007); *Barth v. United States*, 28 Fed. Cl. 512, 514 (1993).

In order to evaluate IHS's motion, we must determine the applicability of the six-year time limit contained in section 605(a) of the CDA. The CDA did not include the six-year time limit until its amendment in 1994 by the Federal Acquisition Streamlining Act, Pub. L. No. 103-355, § 2351(a), 108 Stat. 3243, 3322 (Oct. 13, 1994). This time limit was not immediately applicable on the date of enactment. Instead, its applicability depended upon the promulgation of final regulations. *Id.* § 10001(b)(2), 108 Stat. at 3404; *see also Motorola, inc. v. West*, 125 F.3d 1470, 1473 (Fed. Cir. 1997). On September 18, 1995, the Office of Management and Budget's Office of Federal Procurement Policy (OFPP) published amendments to the Federal Acquisition Regulation (FAR). 60 Fed. Reg. 48,224, 48,230 (Sept. 18, 1995). The regulation at 48 CFR 33.206 states that the six-year limit does not apply to contracts awarded prior to October 1, 1995.

Because the six-year time limit contained in section 605(a) does not apply to contracts awarded prior to October 1, 1995, we look to see when the contract which provided for the payment of FY 1996 CSC was awarded. The parties agree that they entered into a contract on April 4, 1995, and that the related AFA for FY 1996 was signed on September 28, 1995, with an effective date of October 1, 1995. Respondent's Reply to Appellant's Response to Motion to Dismiss at 14-15, Appellant's Rebuttal Brief in Response to Respondent's Reply on Respondent's Motion to Dismiss

at 10-11. IHS argues that because the effective date of the FY 1996 AFA is October 1, 1995, it is subject to the six-year limit set out in section 605(a) of the CDA. Respondent's Reply to Appellant's Response to Motion to Dismiss at 14.

IHS's argument misses the mark because according to the regulation which implemented section 605(a), the applicability of the six-year time limit depends upon the award date of a contract, not a contract's effective date. The contract which underlies this claim was awarded on April 4, 1995, and the related AFA for FY 1996 was awarded on September 28, 1995. Because the six-year time limit does not apply to contracts awarded prior to October 1, 1995, the limit does not apply, whether the relevant effective date is that of the underlying contract or the AFA. Therefore, we deny the motion to dismiss the FY 1996 claim for lack of subject matter jurisdiction.

FY 1997 (CBCA 280-ISDA)

The FY 1997 claim accrued on the last day of the fiscal year, which was September 30, 1997. On June 30, 2005, Metlakatla submitted this claim to the awarding official. IHS moves to dismiss the FY 1997 claim for lack of subject matter jurisdiction because Metlakatla failed to submit this claim to the awarding official within six years after it accrued, as required by section 605(a) of the CDA. Respondent's Motion to Dismiss at 13-14. Metlakatla contends the six-year time limit was met, because the time limit was either equitably or legally tolled. Appellant's Response to Respondent's Motion to Dismiss at 18-31.

Tolling, whether equitable or legal, is a concept which applies to statutes of limitation. If a court (or a board) possesses jurisdiction to consider a claim, the

claim must be filed before the limitations period expires or else it becomes unenforceable. A time limit for filing suit can be suspended, in effect, based upon equitable considerations, *Irvin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), or based upon legal considerations, *Stone Container Corp. v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000). If the applicable statute is tolled for a sufficient period, the time limit for filing suit is met.

Section 605(a) does not contain a statute of limitations which imposes a time limit for filing suit. Rather, it imposes a time limit which this Board's precedent establishes is a prerequisite to our jurisdiction. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514; accord, Gray Personnel, inc., ASBCA 54652, 06-2 BCA ¶ 33,378; *see also Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099 (D.N.M. 2006). As Gray Personnel explained:

> Under the CDA, there are two prerequisites to an appeal to the Board or to the United States Court of Federal Claims:
>
> > Those prerequisites are (1) that the contractor must have submitted a proper CDA claim to the contracting officer requesting a decision, . . . [41 U.S.C.] § 605(a), and (2) that the contracting officer must either have issued a decision on the claim, . . . § 609(a), or have failed to issue a final decision within the required time period, . . . § 605(c)(5).
>
> *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 852 (Fed. Cir. 2004). If a contractor has not submitted a proper claim, the contracting officer does not have the authority to issue a decision.

> The Act . . . denies the contracting officer the authority to issue a decision at the instance of a contractor until a contract "claim" in writing has been properly submitted to him for a decision. § 605(a). Absent this "claim", no "decision" is possible—and, hence, no basis for jurisdiction . . . .

Paragon Energy Corp. v. United States, 645 F.2d 966, 971 (Ct. Cl. 1981). Thus, "[i]t is well established that without . . . a formal claim and final decision by the contracting officer, there can be no appeal . . . under the CDA. It is a jurisdictional requirement." *Milmark Services, Inc. v. United States*, 231 Ct. Cl. 954, 956 (1982).

Section 605(a) as implemented by FAR subpart 33.2, Disputes and Appeals, is the key provision in determining whether there is a proper or formal claim for purposes of the CDA. *See, e.g.*, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc) (definition of a claim); *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1576 (Fed. Cir. 1992) (requirement that a claim be submitted for a decision). [The Federal Acquisition Streamlining Act] added the six year requirement to this key provision, rather than, for example, to 41 U.S.C. §§ 606 or 609, establishing filing periods at the boards and the United States Court of Federal Claims. We conclude, in view of the placement of the six-year provision in § 605(a), that the requirement that a claim be submitted within six years after its accrual, like the other requirements in that section, is jurisdictional. *Accord Axion Corp. v. United States*, 68 Fed. Cl. 468, 480 (2005).

Gray Personnel, Inc., 06-2 BCA at 165,474-75. *Cf. John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008).

Metlakatla's failure to submit its FY 1997 claim to the awarding official within six years after it accrued, as required by section 605(a) of the CDA, deprived this Board of jurisdiction to consider the claim. We cannot suspend the running of the six-year time limit any more than we could suspend the requirements, also found in section 605, that a claim must be submitted to the contracting officer, that a claim must be submitted in writing, and that a claim in excess of $100,000 must be certified. In the absence of a claim which meets all the requirements of section 605, we lack jurisdiction to consider an appeal.

We grant the motion to dismiss the FY 1997 claim for lack of subject matter jurisdiction because Metlakatla failed to submit this claim to the awarding official within six years after it accrued, as required by section 605(a) of the CDA.[4]

FY 1998 (CBCA 281-ISDA)

The FY 1998 claim accrued on the last day of the fiscal year, which was September 30, 1998. On June 30, 2005, Metlakatla submitted this claim to the awarding official. For the same reason we grant the motion to dismiss the FY 1997 claim, we grant the motion to dismiss the FY 1998 claim. We lack subject matter jurisdiction because Metlakatla failed to submit this claim to the awarding official within six years after it accrued, as required by section 605(a) of the CDA.

[4] If we had jurisdiction to consider the FY 1997 claim, it would not extend to any amounts included in the claim dated August 19, 1999, because IHS denied this claim on April 17, 2000, and IHS's decision became final when Metlakatla did not appeal

FY 1999 (CBCA 282-ISDA)

The FY 1999 claim accrued on the last day of the fiscal year, which was September 30, 1999. On June 30, 2005, Metlakatla submitted this claim to the awarding official. We have jurisdiction to consider this claim because Metlakatla submitted it to the awarding official within six years after it accrued, as required by section 605(a) of the CDA. IHS argues that Metlakatla fails to state a claim upon which relief can be granted because in FY 1999, Congress limited the amount of money which IHS had available to fund CSC.

We agree with IHS that Congress restricted the funds available for CSC in FY 1999. The requirement to fund CSC is subject to the availability of appropriations, notwithstanding any other provisions of the ISDA. 25 U.S.C. § 450j-1(b). Congress restricted IHS's FY 1999 appropriation when it provided "not to exceed $203,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs . . ." Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 328, 112 Stat. 2681,2681-337 (1998). No separate amount was designated for the Indian Self-Determination Fund for initial and expanded programs. *Id.*

The fact that funds for CSC were restricted in FY 1999 does not, however, mean that Metlakatla has failed to state a claim upon which relief can be granted. If providing Metlakatla with additional funding for CSC would have caused IHS to expend more than $203,781,000 for CSC in FY 1999, Metlakatla had no statutory or contractual right to such additional funding and its claim for additional funding would not be one upon which we could grant relief. *Greenlee*

County, Arizona v. United States, 487 F.3d 871 (Fed. Cir. 2007); *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999); *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). If, however, IHS could have provided Metlakatla with additional funding for CSC without expending more than $203,781,000 for CSC in FY 1999, Metlakatla might be able to establish it had a statutory or contractual right to such funding up to the amount of the unexpended funds, in which case its claim would be one upon which we could grant relief. We do not know how much of the $203,781,000 IHS expended during FY 1999.

Because we do not know whether providing Metlakatla with additional funding for CSC would have caused IHS to expend more than $203,781,000 for CSC for FY 1999, we deny the motion to dismiss the FY 1999 claim for failure to state a claim upon which relief can be granted.

Decision

The motion to dismiss is GRANTED as to CBCA 280-ISDA and 281-ISDA. The motion to dismiss is DENIED as to CBCA 181-ISDA, 279-ISDA, and 282-ISDA.

/s/ CANDIDA S. STEEL
CANDIDA S. STEEL
Board Judge

/s/ CATHERINE B. HAYATT
CATHERINE B. HAYATT
Board Judge

/s/ MARTHA H. DeGRAFF
MARTHA H. DeGRAFF
Board Judge

APPENDIX D

FEDERAL STATUTES

41 U.S.C. § 605. Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

* * *

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

* * *

(c) Amount of claim; certification; notification; time of issuance; presumption

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

* * *

41 U.S.C. § 606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

* * *

41 U.S.C. § 609. Judicial review of board decisions

(a) Actions in United States Court of Federal Claims; district court actions; time for filing

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.